Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-

JAMES TERRY ROACH,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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1. The Petitioner was seventeen at the time of the crimes for which he is sentenced to death;

2. The Petitioner is a borderline mental retardate who is emotionally immature and who has no significant history of prior criminal activity;

3. The trial judge's findings that petitioner was under the influence of extreme mental and emotional disturbance at the time of the crimes, that petitioner was acting under the domination of another at the time of the crimes, and that petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crimes, preclude, as a matter of law, a finding that petitioner had the sufficient criminal intent to support the imposition of a sentence of death;

4. The petitioner at the time of the crimes was under the influence of a dangerous psychotic inducing drug; involuntarily taken; and

5. The trial judge failed to specifically and affirmatively find that the petitioner intended to and personally took life.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981 No. 81-

JAMES TERRY ROACH,
Petitioner

VS.

THE STATE OF SOUTH CAROLINA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The petitioner, James Terry Roach, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of South Carolina entered in this proceeding on July 17, 1981.

OPINION BELOW

The opinion of the Supreme Court of South Carolina, not yet reported, appears in Appendix A appended hereto (pp. 34 , infra).

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on July 17, 1981. A timely petition for rehearing (see Appendix B appended hereto, pp. 35-40, infra) was denied by Order of the Supreme Court of South Carolina (see Appendix C, appended hereto, pp. 41, infra) on August 26, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I. Whether the imposition of the death penalty upon the petitioner is constitutionally disproportionate in violation of the Eighth and Fourteenth Amendments of the United States Constitution for the following reasons:

1. The petitioner was seventeen at the time of the crimes for which he is sentenced to death;

2. The petitioner is a borderline mental retardate who is emotionally immature and who has no significant history of prior criminal activity;

3. The trial judge's findings that petitioner was under the influence of extreme mental and emotional disturbance at the time of the crimes, that petitioner was acting under the domination of another at the time of the crimes, and that petitioner's capacity to appreciate the criminality of his conduct or to conform the conduct to the requirements of the law was substantially impaired at the time of the crimes preclude, as a matter of law, a finding that petitioner had the sufficient criminal intent to support the imposition of a sentence of death;

4. The petitioner at the time of the crimes was under the influence of a dangerous psychotic inducing drug, involuntarily taken, and;

5. The trial judge failed to specifically and affirmatively find that the petitioner intended to and personally took life.

II. Whether the South Carolina death penalty statute violates the due process and equal protection clauses of the United States Constitution in that it provides to the class of capital defendants who request a jury trial on the issue of guilt the opportunity for a jury determination or lay input on the appropriateness of imposing the death penalty but denies the same opportunity for a jury determination or lay input on the appropriateness of imposing the death penalty to the class of capital defendants who plead guilty, since said classification implicates a fundamental interest and is irrational, arbitrary and capricious?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

South Carolina Death Penalty Statute, Section 16-3-20 through Section 16-3-28, Code of Laws of South Carolina, Cum. Supp. 1978, is set forth verbatim in Appendix E appended hereto (pp. 57-85 <u>infra</u>).

STATEMENT OF THE CASE

James Terry Roach, petitioner herein, was placed under arrest on the charge of auto theft by the Oconee County Sheriff's Department in the early morning of October 31, 1977 at the age of 17. The petitioner was transferred to the Saluda County Jail where the car theft warrant, which had supported his arrest, had originated. The petitioner was then taken to the Sourth Carolina State Law Enforcement Division Headquarters in Columbia, South Carolina, at approximately 5:00 on Wednesday, November 2, 1977 for questioning as a suspect in the Taylor-Hartness murders. Sometime in the early morning hours of Thursday, November 3, 1977, the petitioner, after requesting an attorney but without an attorney being provided, gave a written statement of his involvement and the involvement of co-defendants Joseph Carl Shaw and Ronald Mahaffey, to agents of the State Law Enforcement Division, at the headquarters of the State Law Enforcement Division.

On the morning of Friday, November 4, 1977, the petitioner was brought before the Honorable John Grimball, Resident Judge of the Fifth Judicial Circuit. Judge Grimball found James Terry Roach to be indigent and appointed Walter W. Brooks, Esquire, and Barry George, Esquire, to represent him as well as John Mason, Esquire, as back-up counsel. On Tuesday, November 8, 1977, the petitioner was arraigned. A preliminary hearing was conducted by the Honorable C.R. Delk on Monday, November 28, 1977, at which time probable cause was found and the petitioner was bound over for grand jury action. The petitioner, along with Ronald Mahaffey and Joseph Carl Shaw, were indicted at the November, 1977 Term of the Court of General Sessions, Richland County for the offenses of armed robbery, kidnapping, criminal sexual conduct, two counts of conspiracy and two counts of murder.

The Solicitor, James C. Anders, served Notices upon both the petitioner and Joseph Carl Shaw that the State intended to seek the death penalty on the two murder counts.

On December 5, 1977, a pre-trial motions hearing was held at which time petitioner's trial counsel made, for the first time, a request for an order authorizing a psychiatric examination of the peti-

tioner. Although they had yet to obtain a psychiatrist to perform said examination. Petitioner's trial counsel never formally moved to suppress petitioner's inculpatory statements as involuntary or as obtained in violation of petitioner's constitutional rights.

At said hearing, exactly one week before petitioner's capital trial was to begin, petitioner's trial counsel withdrew, without argument, a motion for a change of venue, even though there was extensive inflammatory and unusual pre-trial publicity concerning the petitioner's case. At the same hearing, again exactly one week before petitioner's capital trial was to commence, petitioner's trial counsel withdrew, without argument, a motion for a continuance, even though at the time of the hearing they had neither seen the state hospital psychiatric report on the petitioner nor obtained an independent psychiatric expert to examine the petitioner (PCH transcript at 1330, 1334-35). Petitioner's trial counsel did not file or argue a single pre-trial motion attacking the constitutionality of the South Carolina Death Penalty Statute (PCH transcript at 1428) even though this was one of the first cases under the new South Carolina Death Penalty Statute.

On December 9, 1977, the Solicitor served Notices of the evidence of the aggravated circumstances which he would introduce in the petitioner's pre-sentencing hearing.

On December 14, 1979, co-defendant Shaw pleaded guilty to criminal sexual assault, kidnapping, two counts of conspiracy, two counts of murder, and armed robbery. Counsel for the petitioner apparently began voir dire but at a point, silent in the record, counsel for the petitioner halted voir dire and informed the state that petitioner wanted to waive his right to a jury on all these charges and enter a plea of guilty. Thus on December 14, 1977, only 44 days after his arrest, James Terry Roach, petitioner herein, at the age of 17, pleaded guilty to criminal sexual assault, kidnapping, armed robbery and two counts of murder and pleaded nolo contendere to two counts of conspiracy. The petitioner explicitly relied on the concept of vicarious liability embodied in the criminal law maxim "the hand

of one is the hand of all" and thus excepted any express or implied admission that he personally took or agreed to take life.

The petitioner's trial counsel then proceeded, without calling for additional time, to put on a case in mitigation, even though admittedly only prepared for voir dire. Petitioner's trial counsel called only six witnesses, not one of which he prepared for longer than it took to walk from the witness room (see affidavits of James Roach, James Broach, Gregg King). Petitioner's trial counsel did not call petitioner's brother or sister, both of whom were in the courtroom (see index of trial transcript and PCH transcript at 647, 664). Petitioner's trial counsel did not call as a witness in mitigation a single representative of a religious community organization opposed to the death penalty (see in trial transcript). Petitioner's trial counsel called only one expert witness, the State's forensic psychiatrist, who lied under oath concerning his publications (PCH transcript at 40) and training (PCH transcript at 1627) and who testified imprecisely and prejudicially concerning Huntington's disease, an incurable deteriorating genetic disease* which petitioner's mother suffers from and from which petitioner's maternal grandfather, great grandfather and uncle all died in the State Hospital (PCH transcript, testimony of Dr. Still).

On or about the 7th day of July, 1978, John K. Grisso, Esquire and O. Grady Query, Esquire, were retained by petitioner's family to represent him on direct appeal to this Court.

This court affirmed petitioner's convictions and sentencing and on May 28, 1979 denied his Petition for Rehearing on June 13, 1979.

J. Michael Farrell, Esquire, was asked to enter the case pro bono, as counsel for the petitioner, on or about July, 1979.

This Court denied petitioner's Petition for a Writ of Certiorari on January 7, 1980 and also denied rehearing.

In the South Carolina Supreme court, the petitioner filed an

* Dr. Camp also identified the white crystalline powder, under the influence of which the appellant was at the time of the crime, as THC, the active ingredient of marijuana, whose melting point is below room temperature, instead of identifying the substance as most probably the notoriously dangerous and psychosis-inducing drug phencyclidine or PCP.

application for post-conviction relief and an Application for Stay of Execution of Sentence of Death on January 25, 1980. The South Carolina Supreme Court, without argument, granted a Stay of Petitioner's Execution on February 5, 1980.

A hearing was held before the Honorable John Grimball in the Circuit Court for Richland County, South Carolina on February 19, 1980. Said hearing resulted in an order, pursuant to which the petitioner served pre-hearing motions on the Attorney General on March 3, 1980. The respondents served upon the petitioner's opposition motions on March 10, 1980. On March 20, 1980, the petitioner served an amended Motion for Discovery, affidavits in support of his Motions and a Memorandum of Law in support of all said motions.

A motions hearing was held on March 24, 1980, before the Honorable Judge Clyde Eltzroth, a Circuit Court Judge of South Carolina assigned to the instant case. After argument and the presentation of evidence, Judge Eltzroth denied petitioner's motions for the appointment of a criminologist, a sociologist and a listening comprehension expert; granted petitioner's motion for the appointment of a Huntington's disease expert; and partially granted petitioner's Motion for Discovery. On March 28, ,980, Judge Eltzroth authorized the employment of a clinical psychologist, pharmacologist and forensic psychiatrist.

On April 7, 1980, an evidentiary hearing on petitioner's application for post-conviction relief commenced. Petitioner's first witness was a pharmacologist, Dr. Larry D. Milne, who testified concerning the glaring inaccuracies and misrepresentations of Dr. Camp's testimony in petitioner's original trial. Dr. Milne testified that instead of the seven scientific publications that Dr. Camp testified that he had, a complete Cumulative Medicus Index search by Dr. Milne revealed only one publication, and three letters to the editor (PCH transcript at 40).

Additionally, Dr. Milne testified that the white crystalline powder which the petitioner injected intravenously just before the instant crime, since THC's melting point is below room temperature, could not possibly have been the drug THC, the active ingredient of marijuana,

as Dr. Camp testified but that the drug under the influence of which petitioner was at the time of the instant crime was, in Dr. Milne's expert opinion, most probably the drug phencyclidine, unlike THC, is an extremely dangerous hallucinogen, with an extensive and troubling history of causing violent and psychotic behavior (TR. 52-53).

Petitioner's next witness was a listening comprehension expert, Dr. Michael Rowls. Dr. Rowls testified that he performed a readability analysis on that portion of petitioner's trial transcript that set forth petitioner's guilty plea (PCH Tr. 113). Dr. Rowls testified that he tested the petitioner's reading and listening comprehension level in order to compare his findings with the readability analysis of the transcript of petitioner's guilty plea (PCH Tr. 112). Based on his testing and analysis, Dr. Rowls concluded that there was a significant gap between petitioner's reading and listening capacity and the capacity necessary to understand the language used by Judge Harwell during petitioner's guilty plea (PCH Tr. 113). Dr. Rowls testified that in his expert opinion, the petitioner had very little understanding of what transpired during his guilty plea before Judge Harwell (PCH Tr. 113). Additionally, Dr. Rowls testified that the length of the proceeding (PCH Tr. 114-15) as well as the length of the sentences and language used during the guilty plea (PCH Tr. 114, 118-19, 142) led him to conclude that, due to his findings as to petitioner's memory ability, petitioner comprehended less than even his testing indicated.

Petitioner then called Officer Cronise of the Richland County Sheriff's Department. Officer Cronise testified that at no time did petitioner's trial counsel interview him (PCH Tr. 153, 165-6) even though he testified that he was the first individual to whom the petitioner incriminated himself (PCH Tr. 159-63). Officer Cronise testified that the petitioner requested an attorney before incriminating himself without an attorney being provided (PCH Tr. 157).

Petitioner's uncle, James Broach then testified that petitioner's trial counsel prepared him for his testimony in petitioner's original trial in the time it took to walk from the witness room to the court-

room (PCH Tr. 201). Mr. Broach also testified that the petitioner feared guns. No testimony concerning petitioner's fear of guns was brought out in petitioner's original trial (PCH Tr. 202-03).

Further, petitioner presented the testimony of five expert criminal trial attorneys* that the representation of the petitioner in his original trial was egregiously imcompetent. Petitioner presented unrebutted expert testimony that to allow a borderline mental retardate to plead guilty to capital murder charges without selecting a jury and without placing on the record that the plea is against counsel's advice and over his objection is, in itself, per se ineffective assistance of counsel (PCH Tr. 233, 267-8, 446, 449, 459, 469, 480, 487, 496, 520-21, 535, 561). Petitioner presented unrebutted expert testimony that the failure to explore in mitigation the fact that the petitioner was under the influence of PCP and not THC constituted ineffective assistance of counsel (PCH Tr. 271-72, 450, 453, 524-25). Petitioner presented unrebutted expert testimony that the failure to explore in mitigation the possibility that the petitioner was suffering from Huntington's disease constituted ineffectiveness (PCH Tr. 261, 274-75, 451, 479, 525). Petitioner presented unrebutted expert testimony that the failure to develop in mitigation independent expert psychiatric evidence constituted ineffectiveness (PCH Tr. 224, 236, 248, 476). Petitioner presented unrebutted expert testimony that to withdraw a motion for a continuance one week before petitioner's capital murder trial when at the time petitioner's counsel had neither examined the state's psychiatric report nor obtained an independent forensic psychiatrist to examine the petitioner constituted ineffectiveness (PCH Tr. 510). Petitioner presented unrebutted expert testimony that the failure to argue one constitutional motion attacking the South Carolina Death Penalty Statute, even though petitioner's case was, in fact, one of the first cases under the statute, constituted ineffectiveness (PCH Tr. 227, 232, 264, 442, 488, 526, 562). Petitioner presented unrebutted expert testimony that the failure to sufficiently

* One of whom is of national prominence and one of which is a highly respected South Carolina attorney who is not opposed to the death penalty and who has been involved in death penalty trials from both sides - prosecution and defense).

explore in mitigation petitioner's family and community ties constituted ineffectiveness (PCH Tr. 225, 452, 532-33). Petitioner presented unrebutted expert testimony that the failure to call a single community or religious representative opposed to the death penalty constituted ineffectiveness (PCH Tr. 224, 559-60).

Moreover, but for the self-serving testimony of petitioner's original trial attorneys, the expert testimony concerning trial counsel's ineffectiveness went totally uncontradicted. The respondents did not call a single expert witness who was willing to testify that the petitioner received effective assistance of counsel. The testimony of James Anders and John McIntosh, the original prosecuting attorneys in petitioner's case, glaringly omitted any statement that petitioner had, in their opinion, received effective assistance of counsel (PCH Tr. see testimony of John W. McIntosh at 1163-99 and of James C. Anders at 1274-1302).

Petitioner subpoenaed the tapes and transcripts of every newspaper, radio and television station which were aired prior to and during petitioner's trial. A great deal of the subpoenaed material was not produced since it had been destroyed. However, petitioner was able to show that all the subpoenaed material existed at the time of petitioner's trial and thus at that time could have been subpoenaed in its entirety. The material produced nevertheless was sufficient to indicate extensive and unusual pre-trial publicity (PCH Tr., see testimony of Richard Hall through James D. Morrison, at 401-33).

Petitioner called his brother and was prepared to call his sister. Petitioner's brother testified that he would have testified for his brother at his original trial but was never asked to (PCH Tr. 647). Petitioner's brother also testified concerning petitioner's fear of guns (PCH Tr. 648-49). Petitioner's sister's testimony would have been substantially the same as her brother's. Additionally, petitioner's uncle's testimony as to petitioner's long-standing fear of guns (PCH Tr. 202-03). Petitioner's uncle was called to testify at petitioner's original trial. However, no testimony was elicited from him concerning petitioner's fear of guns (Trial Tr. 343-45). Petitioner also

called his aunt who offered considerable testimony in mitigation (PCH Tr. 656-62). Petitioner's aunt was available and in the courtroom at the time of petitioner's original trial but was not called nor even questioned (PCH Tr. 661-62).

Petitioner called a clinical psychologist, Dr. Follingstad, who testified that in her expert opinion, based on her extensive testimony and clinical examination of the petitioner, petitioner is incapable of grasping abstract concepts and that, therefore, he is incapable of a knowing waiver of an abstract right due to his deficient mental capacity (PCH Tr. 673-75, 679-86).

Petitioner called a forensic psychiatrist, Dr. Morgan, who disagreed with Dr. Follingstad that the petitioner was totally incapable of grasping abstract concepts but instead testified that, in his expert opinion, based on his review of Dr. Follingstad's testing and on his clinical examination of the petitioner, the petitioner could grasp abstract notions if they were explained to him in language that he understood (PCH Tr. 809-10). Dr. Morgan also testified that based on his examination of the syllabus of the 1978 American Psychiatric Association's Conference and on his personal attendance at said conference in Atlanta in May 1978, that, contrary to Dr. Camp's testimony at petitioner's original trial, Dr. Camp never presented any paper at said American Psychiatric Conference (PCH Tr. 787-89). Dr. Morgan further testified that in his opinion the petitioner was the victim of a combination of his passive dependence and the psychosis of J.C. Shaw (PCH Tr. 803-08). Dr. Morgan also testified that, based on Dr. Milne's testimony, if he had had more evidence from Mr. Mahaffey or from Mr. Williams on petitioner's behavior at the time of the crime, it would have been possible for him to have come to an expert opinion as to whether petitioner was suffering from a drug-induced psychosis at the time of the crime (PCH Tr. 797-98).

Petitioner also called a sociologist, Dr. Joseph E. Jacoby, who testified that, based on his analysis of State Law Enforcement Division statistics for the period covered by the new death penalty and statistics furnished to him by Clyde Davis, staff counsel with the South

Carolina Supreme Court, it was his expert opinion that the death penalty under the new death penalty statute has been imposed racially disproportionately upon individuals who are convicted of taking the lives of white victims (PCH Tr. 307-09). Additionally, Dr. Jacoby testified that if the South Carolina Supreme Court, pursuant to its comparative and proportionality review of petitioner's sentence, excluded from its consideration cases in which capital defendants pleaded guilty but in which no appeal was taken, the pool of cases considered would not, according to currently accepted social science methodology, constitute a scientifically sufficient sample and would, therefore, cause statistically biased results (PCH Tr. 322-27). No social testimony was elicited at petitioner's original trial.

A criminologist, Dr. Paternoster, was also called and testified on the fallacies in the literature finding support for the deterrent effect of capital punishment (PCH Tr. 844, 846-47, 851-52). Dr. Paternoster also testified on the brutalization effect of the death penalty, that is, on the theory that the death penalty, instead of reducing homicides, actually causes an increase in homicides (PCH Tr. 844-47, 849, 853). Again, no such testimony was brought before the sentence at petitioner's original trial.

Petitioner also called Mr. Yarborough who had witnessed the horror of the last execution in South Carolina while a guard at CCI. Mr. Yarborough also testified that he was available and in Columbia at the time of petitioner's trial in 1977 and that his testimony then would have essentially been the same as his present testimony.

Petitioner also called two members of the bar of South Carolina. One of these individuals testified as to a statement which he heard made by Judge Peeples, a Circuit Court Judge of South Carolina, during petitioner's trial but before his sentencing to the effect that he, Judge Peeples, and Judge Ness of the South Carolina Supreme Court had spoken to Judge Harwell, petitioner's sentencing judge, and that Judge Harwell would sentence the petitioner to death (PCH Tr. 708). The other South Carolina lawyer testified as to a statement which he heard made by Walter Brooks during petitioner's trial to the effect

that the petitioner should be sentenced to die (PCH Tr. 830-31). This individual also testified as to statements that he heard made by James Anders, petitioner's prosecutor, to the effect that Judge Harwell had decided to sentence the petitioner to death before he had heard the first bit of evidence in petitioner's case (PCH Tr. 929).

Petitioner called his father, who at petitioner's original trial was asked only one question and whose entire testimony in petitioner's trial transcript took less than one page (Trial Tr. 350-51). Mr. Roach testified that not one of his son's lawyers or their investigators came to Senaca, his son's home (PCH Tr. 724) but that Mr. Brooks placed the sole responsibility on Mr. Roach to bring in friends of his son to come to court (PCH Tr. 728).

Petitioner called an expert on Huntington's disease, Dr. Charles Still, who had by order of Judge Eltzroth, petitioner's post conviction judge, examined both the petitioner and his mother. Dr. Still testified that based upon his examination of petitioner's mother, it was his diagnosis that petitioner's mother suffers from the incurable hereditary brain disease, Huntington's chorea (PCH Tr. 1213). Dr. Still testified, contrary to Dr. Camp's trial testimony, that Huntington's disease can be transmitted genetically from mother to son (PCH Tr. 1212). Dr. Still testified, again contrary to Dr. Camp's trial testimony, that a diagnosis is possible before age 35 (PCH Tr. 1255-56). Dr. Still testified that a diagnosis of Huntington's disease either before or after 35 requires the presence of three things: (1) genetic possibility (that is, one of the parents has Huntington's; (2) chorea (trembling) and (3) mental deficiency (PCH Tr. 1216, 1248). Based on his examination of the petitioner, Dr. Still testified that the petitioner has at least a 50-50 chance of having Huntington's, since his mother undeniably has Huntington's (PCH Tr. 1214). However, he could not diagnose the petitioner has suffering from Huntington's since at present he could not observe tremors (see report of Dr. Still). Dr. Still, however, testified that he did not perform extensive mental tests on the petitioner (PCH Tr. 1250-51). He did testify that in 10% of Huntington's cases, the patient demonstrates a rigidity in

the lower limbs which Dr. Still testified he observed in a small but above-average degree in the petitioner (PCH Tr. 1249-50). Dr. Still testified that he did not consider in his diagnosis any other evidence but the results of his personal testing and clinical examination (PCH Tr. 1210). Dr. Still testified that the brain deteriorating effects of Huntington's disease begins at conception (PCH Tr. 1245) and that the first faculties to be affected are memory and judgment (PCH Tr. 1223-24). Dr. Still also testified that he could not say that the petitioner did not have Huntington's (PCH Tr. 1251).

At the conclusion of petitioner's case, petitioner took the stand himself. Petitioner testified that he never took life or intended to take life (PCH Tr. 943). Petitioner testified that he pleaded guilty because his lawyers told him that he would get a life sentence (PCH Tr. 923, 927). Petitioner denied ever admitting that he had shot anyone (PCH Tr. 957-58). Petitioner testified that Mr. Brooks told him that to choose a jury trial would be like swimming to a boat with a hole in it instead of to a boat without a hole (PCH Tr. 921-22).

The state's case consisted of the two prosecutors at petitioner's trial, petitioner's three trial attorneys, a chemist whose testimony supported the previous testimony of Dr. Milne and a secretary who testified as to information she received from various solicitors (see index of post-conviction hearing). The testimony of petitioner's prosecutors glaringly omitted any statement that either prosecutor considered that petitioner received effective assistance of counsel (see testimony of James C. Anders at 1274-1302 and of John W. McIntosh at 1163-99). Petitioner's trial counsel testified they were prepared to go to trial on the issue of guilt and punishment, but that the only reason petitioner pleaded guilty was because just as they were preparing to pick petitioner's jury, petitioner, a borderline mental retardate, dramatically stood up, was pulled down by them and proceeded to tell them that he wa ed to plead guilty because he had done the crime (PCH Tr. 1005-13). Mr. George and Mr. Brooks testified that Mr. Mason was in charge of the legal research. Mr. Mason testified that he had read many cases whose names he could not remember. Mr.

Mason also testified that he had read the majority opinion of the Gregg v. Georgia case which he estimated to have been 18-20 pages long, despite the fact that there is no majority opinion in Gregg and that each concurring opinion is significantly longer than 18-20 pages (PCH Tr. 1421-69). The state did not call any expert trial attorney that was willing to testify that petitioner received effective assistance of counsel even though they had done so in petitioner's co-defendant's post-conviction hearing.

The state chemist irrationally would not agree with Dr. Milne's testimony that the drug THC could not be a white crystalline powder since he did not know that the melting point of THC was below room temperature. Nevertheless, the state chemist did state that in 1977, 6 out of 10 samples of white crystalline powder that he tested in the State Law Enforcement Division laboratory were Phencyclidine or PCP (PCH Tr. 1478).

During petitioner's evidentiary hearing, petitioner subpoenaed any and all tangible material within the possession of the Bar Grievance Committee on Walter Brooks. The state moved to quash petitioner's subpoena. On the argument that said material was confidential, Judge Eltzroth granted the state's motion and quashed the subpoena. However, subsequent to petitioner's post-conviction evidentiary hearing, this court disbarred Walter Brooks at which time Judge Eltzroth subpoenaed the entire file of this Court on Mr. Brooks. Said material has been made a part of the record herein (see Opinion of the South Carolina Supreme Court disbarring Mr. Brooks in Appendix G, infra, pp.). Note that the Notice and Complaint initiating the disciplinary proceeding against Mr. Brooks were filed approximately one month after petitioner's trial for his life.

On July 8, 1980, his Honor Judge Eltzroth denied petitioner's application for post-conviction relief on each and every ground. Petitioner filed a timely notice of appeal.

On July 17, 1981, the South Carolina Supreme Court in a Per Curiam Order affirmed the denial of petitioner's Application for Post Conviction Relief. Petitioner filed a timely Petition for Rehearing

in the South Carolina Supreme Court together with an Application for a Stay of Execution. On August 26, 1981, the South Carolina Supreme Court denied both petitioner's Petition for Rehearing and his Application for a Stay of Execution.

Petitioner filed a Petition for a Writ of Habeas Corpus by a Person in State Custody toegther with an application for a Stay of Execution in the United States District Court for the District of South Carolina. On September 4, 1981, the Honorable Falcon B. Hawkins granted a Stay of petitioner's execution (see Appendix F. infra, pp. 86-87) and appointed present counsel under the Criminal Justice Act of 1964, as amended (see Motion to Proceed in Forma Pauperis, supra).

The two issues upon which petitioner is herewith petitioning this Court for certiorari have been presented in his Application for Post Conviction Relief in the Circuit Court for Richland County of the State of South Carolina. After relief was denied in said Circuit Court on these two issues and others, petitioner appealed to the South Carolina Supreme Court raising said two issues and others. The denial of relief on these two issues by the South Carolina Supreme Court provides jurisdiction in this Court for the instant petition.

REASONS FOR GRANTING THE WRIT

I. The Imposition of the Death Penalty upon the petitioner is constitutionally disproportionate in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution for the following reasons:

1. The petitioner was seventeen at the time of the crimes for which he is sentenced to death;

2. The petitioner is a borderline mental retardate who is emotionally immature and who has no significant history of prior criminal activity;

3. The trial judge's findings that petitioner was under the influence of extreme mental and emotional disturbance at the time of the crimes, that petitioner was acting under the domination of another at the time of the crimes; and that petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crimes preclude, as a matter of law, a finding that petitioner had the sufficient criminal intent to support the imposition of a sentence of death;

4. The petitioner at the time of the crimes was under the influence of a dangerous psychotic inducing drug, involuntarily taken; and

5. The trial judge failed to specifically and affirmatively find that the petitioner intended to and personally took life.

Death as a punishment is unique in its severity and irrevocability. Gregg v. Georgia, 428 U.S. 153, 187 (1976); Furman v. Georgia, 408 U.S. 238, 286-291 (1972) (Brennan, J., concurring); id. at 306 (Stewart, J., concurring). Since it is the most extreme of criminal sanctions, it must be reserved for the most extreme crimes. Since 1910, it has been a settled principle that "punishment for the crime should be graduated and proportioned to the offense." Weems v. U.S., 217 U.S. 349, 366-7 (1910). The unique punishment of death has been held by this Court to be excessive and unconstitutional if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). This Court in Gregg concluded that "the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime,"

Id. (emphasis added). Coker, on the other hand, held the death penalty excessive for the non-homicidal crime of rape. Thus, this Court has ruled in the application of this test that the death penalty is disproportionate, always or nearly always, to an offense that does not involve the taking of a life. This Court has left open the question whether a defendant, who though somehow involved in a murder, has not been found to have himself taken a life may be subjected to the loss of his own. We submit that where the defendant has not been found to have taken a life or caused the taking of life (hereinafter non-triggerman), the death penalty falls under both branches of the Coker test. The Court's prior decisions lead to that conclusion, and it is supported also by other pertinent considerations: legislative and jury responses to cases posing the question and the rationales supporting the death penalty.

This Court's decisions have looked to certain objective indicators in appraising the evolving standards of decency of our society, which speak to the question of excessiveness of the death penalty in particular situations. It has examined, for example, the frequency with which the death penalty was meted out or exacted, in fact, the legislative response of the states in enacting new capital punishment statutes after the decision in Furman, supra. See Gregg v. Georgia, supra; Woodson v. North Carolina, supra; Coker v. Georgia, supra.

While it is true that non-triggermen, lookouts, getaway car drivers etc., have sometimes been sentenced to death, these persons have almost never been actually executed in recent decades. A search of all reported appellate opinions in post-1954 cases of execution for homicide reveals only six cases out of 373 in which clearly identifiable felony-murder non-triggermen were executed. The last such execution occurred in 1956; twenty-two years ago.[1]

1/ This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicides listed in the inventory in Bowers, Executions in America 200-401 (1974) additional cases listed in the National Reporter System as well as the three most recent executions.

In addition to six clearly identifiable non-triggermen the survey found two non-felony murders where the executed person had others commit the homicide for him, and eight other cases where the facts were not reported in sufficient detail to determine whether there was a possibility the executed person was a non-triggerman.

This survey is an updated version of the identical survey data set forth in the Lockett and Bell briefs and reply briefs as well as the petition for certiorari in the Legare case.

By comparison, there have been 72 executions for rape in this country since 1955.[2] Thus it is apparent that executions for homicides not clearly committed by the person executed, have been a great deal less prevalent in this country than the practice declared unconstitutional in Coker v. Georgia, supra. Looking as this Court did in Coker to "guidance in history and from the objective evidence of this country's present judgment," Id. at 4963, one finds that the death penalty for non-triggermen is today virtually extinct.[3] Additional research from the same sources indicates that, in the same period only three of the 373 persons executed were under the age of 18.[4] America is thus as reluctant to execute its children as it is to execute those not clearly shown to have personally perpetrated the homicide for which they were convicted.

Examining the actions of state legislatures, of the jurisdictions which now have death penalty statutes, five would preclude the execution of non-triggermen,[5] sixteen others, to include South Carolina,[6] specify that a minor degree of participation be considered,[7] and the remaining

2/ U.S. Department of Justice, LEAA, National Prisoner Statitistics Bulletin, No. SD-NPS-CP 3, Capital Punishment 1974 (Nov. 1975) 16-17.

3/ In Florida there have been several decisions explicitly rejecting the death penalty in cases of non-triggermen. See McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977), and cases cited therein; see also Slater v. State, 316 So. 2d 539 (Fla. 1975) and Taylor v. State, 294 So.2d 648 (Fla. 1974).

4/ The three, all age 17, the same age as petitioner on the date of the offense herein, are J. Johnson (1961, Alabama); Leonard Shockey (1959, Maryland); and Norman Roye (1956, New York). All were black.

5/ Col. Rev. Stat. 1973 Sect. 16-11-103(5)(d)(1976 Cum. Supp.); Conn. Gen. Stat. Ann. Section 53a-46a(f)(4) (1976 Cum. pocket part); Smith-Hurd Ill. Ann. Stat. C.38 Sect. 9-1(b)(6)(a) (1977 Amendment; 18 Pa. C.S.A. Sect. 1102 and 2502 (1977 Cum. Ann. pocket part) death penalty precluded for both principals and accomplices in felony murder); 49 U.S.C.A. Sect. 1473 (6)(D)(1976).

6/ As argued supra, the sentencing authority in petitioner's case refused to acknowledge that there was evidence on the mitigating circumstances of the petitioner's minor participation.

7/ Code of Ala. Recompiled, tit. 15, Sect. 342 (9)(d) (1975 interim supp.); Aug. Rev. Stat. Sect. 13-454(P)(3) (1973 Supp. pamphlet); Ark. Code Sect. 41-1304(5) (1975 Supp.); Fla. Stat. Ann. Section 921.141(6)(d) (1976 Cum. pocket part); Burns Ind. Stat. Ann. Sect. 35-50-2-9(c)(4) (1977 Amendment); Baldwin's Ky. Rev. Stat. Sect. 532.025(2)(b)(5) (as amended by c.15 H.B. 14 Ky. Laws of 1976); LA. Code Crim. Pro. Ann., Art. 905.5(g) (1977 Cum. ann. pocket part); Rev. Stat. Mo. ch. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), Sect. 5.1(3)(4) (1977); Nebr. Rev. Stat. Sect. 29-2523(2)(e) (1975); Nev. Rev. Stat.

eight allow consideration of any mitigating factor.[8] The single state, Ohio, that excluded minor participation as a mitigating factor under its death penalty statute had its statute struck down by this Court for just that reason. See Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 627 (1978).

Thus, the evolving standards of decency in this nation as embodied in the Eighth Amendment require that evidence of minor participation in the homicidal act be at least considered by the sentencing authority in the capital sentencing process. There is no clue in the record or in the trial judge's report that the sentencing authority considered the petitioner's version of his participation in the homicides or the government's witness Mr. Laroque's testimony that Shaw, petitioner's co-defendant, admitted to killing both victims and never indicated that the petitioner was a triggerman.

While the death penalty for deliberate murder is not unconstitutional, Gregg v. Georgia, supra, we submit that in the case of an accomplice who has neither been specifically found to have intended or participated in the act of killing, nor even to have known in advance of the killer's intentions, his participation is not "deliberate murder" within the purview of the Gregg series, and is grossly disproportionate. Further the death penalty in such an instance make no reasonable contribution to acceptable goals of punishment, Coker v. Georgia, supra. The individual culpability of the offender must be considered even where the death penalty is sought to be inflicted for murder, where the offender has not been specifically found to have intended and actually taken life.

Traditional felony-murder doctrine holds and is the law in South Carolina that an accomplice to a felony may be invested vicariously with the homicidal intent and participation of the principal offender who

8/ Del. Code Sect. 4209(c) (1977 Amendment); 6a. Code Ann. Sect. 27-2534.1 (b) (1974 Cum. pocket part); Idaho Code Sect. 19-2515(e) (as amended by 1977 Idaho Sess. Laws ch. 154, Sect. 4); Miss. Code of 1972 Sect. 97-3-21(2) (1977 Amendment); Mont. Rev. Codes Ann. Sect. 95-5-105(1) (1974 interim supp parts); Okla. Stat. Ann. Sect. 701.10 (1976 Cum. pocket part); Vernon's Texa Code Cum. Proc. Ann., Art. 37.071(b)(2) (see Jurek v. Texas, 428 U.S. at 272-73); Va. Code Ann. Sect. 19.2-264.3(B) (1977 Amendments ch. 492).

commits aggravated murder after the felony in which the accomplice was involved has commenced, irrespective of the accomplice's lack of knowledge that murder would be committed, and his lack of approval and participation in the actual killing.

The South Carolina statutory scheme seems to require consideration of the presence or lack of homicidal intent and participation by the accomplice-offender in the killing including explicitly in its statute as a mitigating circumstance, Sect. 16-3-20(C)(b)(4), "the defendant was an accomplice in the murder committed by another person and his participation was relatively minor" and additionally by requiring the trial judge in his standard questionnaire to indicate which if any of the mitigating circumstances were in evidence. However, the trial judge in petitioner's case did not indicate in its trial report questionnaire that there was evidence that the petitioner was an accomplice in the murders committed by another person, even though there was such evidence.[9]

We do not maintain that a state may not punish an offender more severely when the felony in which he is involved results in the death of an innocent victim; such an offender may be properly convicted of felony murder if the state chooses to make felony murder without specific homicidal intent on the part of the offender a crime. What we do contend is that the Constitution will not permit the taking of his life by the state where he has not been clearly shown to have intended or participated in the killing of the victim. Such a penalty without such a specific finding of fact is grossly disproportionate to the possible offender accomplice's involvement in the killing. As argued supra no specific finding of fact as to whether petitioner was a triggerman - "a critical issue of punishment" - violated petitioner's due process rights to a fair trial on the issue of punishment and to effective appellate review. Additionally the absence of such a specific finding of fact renders the imposition of the death penalty upon petitioner disproportionate and thus constitutionally infirm.

9/ Petitioner's statement admitted into evidence and Mr. Laroque's testimony both supported such a mitigating circumstance.

Moreover, a dispassionate consideration of the record reveals no substantial or credible evidence upon which it can be reliably concluded that petitioner intended or actively participated in the homicidal acts for which he stands condemned to death. A brief summary of the evidence follows:

Other than petitioner's statement which is exculpatory as to homicidal intent and participation and Mr. Laroque's testimony which exculpates petitioner as to homicidal intent and participation and supports the petitioner's version of his involvement, the only other evidence of petitioner's involvement comes from criminal confederates who received life sentences in return for their testimony.[10] Further, the petitioner pleaded guilty to two counts of murder explicitly upon a theory of the "hand of one is the hand of all" and pleaded nolo contendere to conspiracy which also excepts any admission of intent.

We submit that this evidence wholly fails to destroy any reasonable possibility that petitioner did not intend to take life. If, as we contend, the Eighth Amendment prohibition of disproportionate and excessive punishment precludes the death penalty against an offender not found to have intended to take life or to have taken life, the petitioner's death sentence cannot constitutionally be affirmed.

Of course, the Court need not reach that question here. For, in addition to the unclear attenuated nature of petitioner's involvement in the killing of the two victims, other circumstances that are uncontested in the record make the imposition of the death penalty in this case grossly and manifestly excessive.

Taken alone without consideration of mental or emotional evaluation, the South Carolina death penalty statute specifically makes the fact that "the defendant was below the age of eighteen at the time of the crime" Sect. 16-3-20(c)(b)(9), a statutory mitigating circumstance shall be considered by the judge, thereby indicating the abhorrence of the State of South Carolina's popularly elected representative to the imposition of the

10/ Ronald Mahaffey was a co-defendant in the instant case and Robert Williams was a co-defendant in a murder which occurred earlier. Additionally neither witness had known the defendant for longer than two weeks. Further, Williams was in the Army with Shaw, lived with Shaw and by incriminating Roach, Williams was partially exculpating Shaw.

death penalty upon those below that chronological age.

Further, petitioner was not only chronologically below the age of eighteen at the time of the crime but was found upon evaluation to have an I.Q. of from 67-80; to be a borderline retardate; to function at far less than his chronological age in both social and academic skills.[11] Thus, the combined consideration of the petitioner's chronological age with his I.Q. shapes the constitutional proportionality of imposing the penalty of death upon a seventeen year old youth who functions at the level of slightly above a moron.

In addition the report of the trial judge indicates a finding that the murder was committed while the defendant was under the influence of mental or emotional disturbance.

Petitioner was further found by his Honor, the trial judge, to be substantially impaired in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Such a finding in many jurisdictions would be a total defense to criminal conduct and reflect the finding necessary to a successful insanity test under the A.L.I. model penal code test.[12]

Petitioner was also found to be under the domination of another person - a person five (5) years older than he; who had been a military policeman; who had fed him; housed him; and provided him with beer, drugs and women for approximately two (2) weeks before the incident.

The imposition of the death penalty under these circumstances would thwart the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86, 101, from which the Eighth Amendment is said to draw much of its meaning and which are reflected in the legislatively enumerated statutory mitigating circumstances of the South Carolina Statute. The clear intent of the South Carolina Legislature and the mandate of this Court's decisions is that while the sentence

11/ The Dictionary of Psychology, New Rev. Ed. (Laurel, 1975), defines in I.Q. figures a moron's I.Q. between 50 and 70, an imbecile between 20 and 50 and an idiot's between 0 and 20.

12/ See Model Penal Code Sect. 210.6(1)(e) (Proposed final Draft 1962) death penalty may be excluded if defendant's physical or mental condition calls for leniency) Id. at Sect. 210.6(4)(b)(g)(h) (mitigating circumstances in death penalty provision include presence of mental or emotional disturbance, diminished responsibility and age). See also Liebman and Shepart, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate"; Mental Disorder as a Mitigating Factor, 66 Georgetown Law J. 757 (1978).

of death may not be cruel and unusual punishment for the commission of murder during the commission of rape, kidnapping and robbery while armed with a deadly weapon, the imposition of that sentence on a seventeen year old offender; who is mentally retarded, under the dominance of another person, drug dependent and influenced, unable to appreciate the criminality of his actions, has no history of violence; is mentally or emotionally disturbed, involved in the instant case, not only a statutory construction violative of both the Eighth and Fourteenth Amendments, but would be a substantively unconstitutional and disproportionate cruel and unusual punishment.

A. The constitutional imposition of the death penalty requires a finding of intent to take human life beyond a reasonable doubt.

It is settled that the command of the Fifth and Fourteenth Amendments to the Constitution of the U.S. "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship, 397 U.S. 358, 364 (1970). See also e.g., Cool v. U.S., 409 U.S. 100, 104 (1972); Hankerson v. North Carolina, 432 U.S. 233, 238-39 (1977); Estelle v. Williams, 425 U.S. 501, 503 (1976) (dictum); Taylor v. Kentucky, 436 U.S. 478 (1978); Jackson v. Virginia, 47 VSLW 4883 (U.S., June 29, 1979), The same standard of proof is required to establish any fact upon which a death sentence is to be based. For the "qualitative difference [between death and lesser punishments entails]...a corresponding difference is the need for reliability in the determination that death is the appropriate punishment in the specific case". Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion). Moreover, the reasonable-doubt standard is the fundamental instrument of the Anglo-American legal system for assuring reliability in criminal judgments, recognized not only as "a prime instrument for reducing the risk of convictions resting on factual error", In re Winship, supra, 397 U.S. at 363, but as an indispensable safeguard also against factual error in determining "the degree of criminal culpability", Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). This is so because:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party

> has at stake an interest of transcending value... this margin of error is reduced as to him by the process of placing on the other party the burden of proof beyond a reasonable doubt. [Speiser v. Randall, 357 U.S. 513, 525-26 (1958)].

Thus, the Fifth, Eighth and Fourteenth Amendments require proof beyond a reasonable doubt of any fact or circumstance that is to be used as a basis for taking a person's life.

Due Process protections are demanded where "a new finding of fact... that was not an ingredient of the offense charged" must be made in order to support a particular sentencing outcome. Specht v. Patterson, 386 U.S. 605, 608 (1967).

The infliction of a death sentence upon any person without a finding that the person intentionally acted to take human life is disproportionate and excessive punishment forbidden by the Eighth and Fourteenth Amendments to the Federal Constitution. In Gregg v. Georgia, 428 U.S. 153 (1976), the prevailing opinion considered "whether the punishment of death is disproportionate in relation to the crime for which it is imposed", Id., at 187, and concluded that where the crime is "murder, and when a life has been taken, deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime". IBID (emphasis added). Subsequently, in Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the death penalty was disproportionate and therefore unconstitutional for the crime of rape where the victim was not killed. The logic of Coker plainly applies to any non-fatal felony. See Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam), vacating two death sentences imposed upon Eberheart's convictions, in two counts, of non-fatal rape and non-fatal kidnapping.

It is now well settled that the infliction of capital punishment on the basis of the crime alone, without specifically assessing the offender's individual culpability for it, ignores considerations that are "a constitutionally indispensible part of the process of inflicting the penalty of death". Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion). See Lockett v. Ohio, 438 U.S. 586, 602-608 (1978)(plurality opinion); (Harry) Roberts v. Louisiana, 428 U.S. 325, 332-334 (1976) (plurality opinion). The plain import of Woodson, Lockett and the two

Roberts cases, is that capital sentencing must depend upon the examination of the individual culpability of the offender; and if an offender's culpability is no greater than Coker's, then the infliction of the death penalty upon him would be both disproportionate under Coker and affront the Eighth Amendment's command that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice..." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion).

Petitioner asserts and has asserted from the first time he spoke to the police that he was not a triggerman, that he did not take life or ever intend or agree to take life. The trial judge did not specifically find as a fact that the petitioner intentionally took human life. In fact, the trial judge found that the petitioner was acting under the domination of another at the time of the crime. State v. Shaw, et al, 255 S.E. 2d 799, Appendix B (1979); Appendix Appended hereto. Further, the trial judge found that the petitioner suffered from diminished capacity at the time of the crime in that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. IBID. Further, the trial judge found that the petitioner was under the influence of extreme mental or emotional disturbance. IBID. Further, the trial judge found that petitioner's mentality was a mitigating circumstance on his behalf. IBID. Further the trial judge found that the fact that the petitioner was below the age of 18 at the time of the crime was a mitigating circumstance on his behalf. IBID. Further, the trial judge found that petitioner was under the influence of drugs and alcohol at the time of the crime. IBID.

Moreover, it is now undisputed that there is a 50% chance that petitioner has a terminal brain-deteriorating disease that would cause him to abuse drugs and alcohol and which would have been destroying his capacity for higher mental functions since his conception. (PCH Transcript, testimony of Dr. Still).

Further, it is now undisputable that the drug that was injected into the petitioner just before the crime could not have been TCH since the melting point of THC is below room temperature and therefore could never appear as a brown or white crystalline powder at room temperature. Further, petitioner has shown by unrebutted expert testimony that the probablity

is that the brown or white crystalline powder was Phencyclidine, PCP, (PCH Transcript, testimony of Dr. Milne and of Mr. Wells).

Further, petitioner asserts that under two theories his drug influence at the time of the crime was involuntary:

1. If he has Huntington's disease, drug use would be involuntary in the same way that an alcoholic involuntarily injects alcohol; and

2. Since petitioner injected what he thought to be TCH, a derivative of marijuna, which was, in fact, PCP, a very dangerous psychotic inducing drug, his intoxication cannot be said to be knowing and thus voluntary.

Therefore, considering all of the evidence that is now undisputed before this Court, petitioner asserts that even if the petitioner is found to bear some degree of culpability for homicide the evidence as a matter of law is insufficient to support a finding beyond a reasonable doubt that the petitioner had the specific intent to kill - a finding which is constitutionally necessary to expose the petitioner to the death penalty. As Mr. Justice White succinctly concluded in his concurring opinion in Lockett v. Ohio, supra, 438 U.S. at 624, "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim".

The Fifth and Fourteenth Amendments require proof beyond a reasonable doubt of any fact that is to be used as the basis for taking a person's life (see argument, supra). And the Eighth Amendment commands that the death penalty cannot be imposed without as the basis of a finding that the individual intentionally, that is with the specific intent to kill, caused the death of the victim (see argument supra). Therefore, petitioner's death sentence cannot be allowed to stand unless there is sufficient evidence upon which a reasonable person could conclude beyond a reasonable doubt that petitioner possessed a purpose to cause the death of a victim.

Petitioner asserts that as a matter of law the evidence is insufficient. A reasonable person could not conclude beyond a reasonable doubt, upon all the evidence that is presently before this Court, that petitioner was capable of or actually possessed a purpose to take human life.

We submit in summary, that death is a disproportionate and consti-

tutionally impermissible penalty for a (1) seventeen year old offender, (2) who is emotionally immature and a borderline mental retardate, (3) who has no significant history of prior criminal activity, (4) who at the time of murders for which he is presently sentenced was under the influence of extreme mental or emotional disturbance, (5) who at the time of the murders was acting under the domination of another persor, (6) who at the time of the murders was under the influence of a psychotropic hallucinogenic drug hypodermically injected, (7) whose capacity at the time of the murders to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and (8) who was not specifically found to have intended to take life or to have taken life. This Court cannot escape its self-assumed destiny to make actual the ideals of the Eighth and Fourteenth Amendments in every case of the irrevocable imposition of the most severe of penalties, death.

Moreover, this Court has recently granted certiorari in two cases which present materially identical constitutional questions under the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. Eddings v. Oklahoma, cert. granted 88 Led. 237 (1981); Enmond v. Florida, cert. granted ____ USLW ____ (October 19, 1981).

II. The South Carolina Death Penalty Statute violates the due process and equal protection clauses of the U.S. Constitution in that it provides to the class of capital defendants who request a jury trial on the issue of guilt the opportunity for a jury determination or lay input on the appropriateness of imposing the death penalty but denies the same opportunity for a jury determination or lay input on the appropriateness of imposing the death penalty to the class of capital defendants who plead guilty, since said classification implicates a fundamental interest and is irrational, arbitrary and capricious.

The equal protection clause of the Fourteenth Amendment has undergone rapid and dramatic transformation in recent years. Traditionally, it supported only minimal judicial intervention in most contexts. Ordinarily, the command of equal protection was only that government must not impose differences in treatment "except upon some reasonable differentiation

fairly related to the objection of regulation," as Justice Jackson put it in Railway Express Agency v. New York, 336 U.S. 106 (1949). That old variety of equal protection security focused solely on the means used by the legislature: it insisted merely that the classification in the statute reasonably relate to the legislature purpose. Unlike substantive due process equal protection scrutiny was not typically concerned with second-guessing and restraining legislative ends. Moreover, usually the close fit between classification and purpose, perfect congruence between means and ends was not required. Judges were prepared to allow legislators considerable flexibility to act on the basis of broadly accurate generalizations and were prepared to tolerate some over-inclusiveness and under-inclusiveness in classification schemes. Only in special, limited contexts was equal protection found to have a deeper "bite" during most of its history -- most notably in racial discrimination cases. The historical background of the Fourteenth Amendment persuaded judges at an early point to apply strick scrutiny and to adopt a less differential stance toward racially discriminating classifications, but in most contexts, the impact of equal protection was very limited, both in frequency of invocation and scope of intervention.

During the decades of extensive Court interference with State economic legislation under the Fourteenth Amendment it was usually due process; not equal protection, that provided the cutting edge. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. (1915) Adair v. United States, 208 U.S. 161 (1908). At the height of the Lochner era, example, Justice Holmes could refer to equal protection as "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200 (1927). Another comment, by Justice Jackson in the Railway Express Case, supra, reflects the relatively narrow intrusion into the legislative domain traditionally associated with equal protection:

> Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand, it merely means that the prohibition or regulation must have a broader impact.

What Justice Jackson there emphasized is that the "old equal protection ordinarily focused soley on legislative means, on the rationality of classification, not on legislative objectives. Though due process, too, has a means ingredient, it is more commonly associated with restraints on legislative ends, in the era of Roe v. Wade, 410 U.S. 113 (1973) as in the Lochner era.

From that long-maintained modest role, equal protection burgeoned into a major interventionist tool during the Warren era, especially in the 1960's. The Warren Court did not abandon the differential ingredients of the old equal protection: in most areas of economic and social legislation, the demands imposed by equal protection remained as minimal as ever. Indeed, the Warren Court's hands-off stance was more permissive than that of its predecessors. The equal protection revolution of the Warren years took the form of finding large new areas where strict rather than differentiated two-tier approach evolved by the late 1960's: in addition to the differential "old" equal protection, there was the mounting phenomenon of a "new" equal protection connoting strict scrutiny. It was a sharply differential two-level approach:

> "The Warren Court embraced a rigid two-tier attitude. Some situations looked as if the aggressive 'new' equal protection with scrutiny was strict in theory, and fatal in fact; in other contexts, the differential 'old' equal protection reigned, with minimal scrutiny in theory, and virtually none in fact." Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev., 1 (1972).

A. The intensive review associated with the strict scrutiny o f the new equal protection imposed two demans - a demand not only as to means but also as to ends. Legislation qualifying for new equal protection for new equal protection strict scrutiny required a far closer fit between classification and statutory purpose, a far closer congruence between means and ends, than the rough and ready flexibility traditionally tolerated by the old equal protection. Moreoever, equal protection became a source of ends scrutiny as well; legislation in the areas of the new equal protection had to be justified by "compelling State interests."

The Warren Court identified the areas appropriate for the strict scrutiny of the new equal protection by searching for two characteristics: the presence of "suspect" classifications; or an impact on "fundamental"

rights or interests. What is clear from the history of equal protection over the last decade and a half is that equal protection has come a very long way indeed from being the "last resort of constitutional arguments." Instead, it has become the most prolific source of constitutional litigation.

The equal protection issue which the South Carolina death penalty poses is that of a non-economic classification in the criminal process. Specifically, we submit, that the opportunity for a jury determination or lay input into the determination of the appropriateness of imposing the death penalty is a fundamental right under the Eighth Amendment and that a distinction denying such a determination or input to a class of individuals who choose to plead guilty should trigger strict scrutiny, placing on the government the burden of showing a "compelling State interest for such a classification."

Further, even if lay input in a capital case is not a fundamental interest triggering strict scrutiny, the modern court has not treated non-economic classifications in the criminal area with the extreme deference of the old equal protection. Rather, it has invalidated classifications by announcing traditional equal protection standards but applying them "with bite." For example, in Jackson v. Indiana, 406 U.S. 715 (1972), this invalidated provisions for the pre-trial commitment of incompetent criminal defendants by comparing laws applicable to the petitioner with those governing commitment of persons not charged with offenses. This Court found that criminal defendants were subject to more lenient commitment standards and to a more stringent standard of release.

In a case involving an issue closely analogous to the issue presented here the United States Supreme Court in Humphrey v. Cady, 405 U.S. 504 (1972) found an equal protection challenge to commitment procedures under the Wisconsin Sex Crime Act sufficient to warrant an evidentiary hearing on remand. Justice Marshall's opinion devoted most attention to the fact that jury determinations preceded commitments under the Mental Health Act, but were not afforded under the Sex Crimes Act.

Thus, petitioner submits that the South Carolina Death Penalty Statute in providing an opportunity for a jury determination or lay input into the approriateness of applying the death penalty to individuals who

exercise their right to a jury trial on the issue of guilt, but which denies such an opportunity for a jury determination or lay input to individuals who plead guilty, violates the Equal Protection Clause of the Fourteenth Amendment. Said classification violates Equal Protection because there is no rational justification for the classification other than time and economic cost. It is well settled that these justifications cannot meet constitutional muster when a fundamental interest is involved. It is petitioner's assertion that a capital defendant's interest is an opportunity for a jury determination or lay input into the decision whether to impose the State's ultimate penalty reaches constitutional dimension. The clear language of this Court mandates a finding that a capital defendant has a fundamental interest in the opportunity for lay input into the decision whether to impose the penalty of death. Jury determinations are "a significant and reliable index of contemporary values..." Gregg v. Georgia, 428 U.S. at 181 (plurality opinion)(1976). Thus, strict scrutiny should be applied to the S.C. Legislature's decision to give one class of capital defendants the opportunity for lay input into whether they die but to deny this opportunity to another class of capital defendants. Said strict scrutiny shifts the burden upon the state to deomonstrate a compelling state interest which justifies said classification.

B. Even if strict scrutiny is not triggered, surely whether someone lives or dies would trigger as much scrutiny as whether someone is institutionalized. "The penalty of death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); See also Gardner v. Florida, 430 U.S. 349, 357-58 (1977). Therefore, at the very least, modern equal protection with bite should be applied to this legislative classification requiring that the state domonstrate an important state interest other than logistical convenience or economic cost to justify said classification. The State has offered no justification for this classification, nor even the obvious economic one. Therefore, the S.C. Death Penalty Statute is unconstitutional in violation of the Equal Protection Clauses of the U.S. Constitution, in that said statute arbitrarily provides one class of capital defendants with the opportunity for a jury determination or lay input as to the appropriateness of imposing the death penalty but denies said opportunity to another class.

It may well be true that the S.C. legislature could choose to deny either class of capital defendants the opportunity for a jury determination or lay input as to whether they live or die. However, to provide said opportunity to one class but deny said opportunity arbitrarily to another is violative of equal protection.

This Court must exercise its constitutional role especially with respect to the imposition of the state's ultimate penalty, to insure that state legislatures do not provide procedural protections according to arbitrary classifications.

CONCLUSION

Petitioner prays that the Writ of Certiorari be granted, or that in the alternative this court delay its decison on this Petition until after its consideration of Eddings v. Oklahoma, cert. grant. 88 Led 237 (1981) and Enmond v. Florida, cert. grant. ____ USLW____ (October 19, 1981).

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Terry Roach, ... Appellant,

v.

State of South Carolina, Daniel R. McLeod, Attorney General for South Carolina, and James Anders, Solicitor For The Fifth Judicial Circuit,. . . . . Respondents.

Appeal From Richland County
Clyde A. Eltzroth, Judge

Memorandum Opinion No. 81-MO-197
Filed July 17, 1981

AFFIRMED

O. Grady Query, of Charleston; John K. Grisso, of Columbia; J. Michael Farrell, of Philadelphia, Pa.; and Chief Attorney John L. Sweeny, of S. C. Commission of Appellate Defense, of Columbia, for appellant.

Attorney General Daniel R. McLeod, Sr. Assistant Attorney General Brian P. Gibbes and Assistant Attorneys General William K. Moore, Kay G. Crowe and Donald J. Zelenka, all of Columbia, for respondents.

PER CURIAM: Appellant pleaded guilty to murder, and to other offenses constituting statutory aggravating circumstances under this State's death penalty law, South Carolina Code of Laws, §16-3-10, et seq. (Supp. 1980). He was sentenced to death. On direct appeal, we painstakingly considered the validity of his guilty plea, the constitutionality of the statute, and the constitutionality of imposing the death penalty on appellant. State v. Shaw and Roach, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. denied, 444 U.S. 1026, 100 S.Ct. 690, 62 L.Ed.2d 660, reh. denied, 444 U.S. 1104, 100 S.Ct. 1073, 62 L.Ed.2d 791 (1980). He now appeals from the denial, after a hearing, of his application for Post-Conviction Relief. We affirm.

After careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ George T. Gregory, Jr. A.J.

s/ Joseph R. Moss A.A.J.

s/ William L. Rhodes, Jr. A.A.J.

EXHIBIT "A"

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
HONORABLE CLYDE A. ELTZROTH, Presiding Judge

JAMES TERRY ROACH, :
Appellant

VS. : PETITION FOR REHEARING

STATE OF SOUTH CAROLINA, DANIEL :
R. McLEOD, ATTORNEY GENERAL
OF SOUTH CAROLINA, AND JAMES
C. ANDERS, SOLICITOR FOR THE
FIFTH JUDICIAL CIRCUIT,
Respondents

TO THE HONORABLE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA:

The Petitioner, Appellant James Terry Roach respectfully requests a rehearing in the above entitled cause and, in support thereof, respectfully shows:

1. This Honorable Court filed its Opinion No. 81-Mo-197 on the 17th day of July, 1981, affirming the decision of the Honorable Clyde A. Eltzroth.

EXHIBIT "B"

2. Appellant James Terry Roach seeks a rehearing upon the following grounds:

(a) Neither the finding that appellant was competent to stand trial, nor the guilty plea proceedings held in the trial court, are constitutionally adequate to resolve the issue of appellant's competency to waive his constitutional right to trial

Appellant contends that his competency to enter a guilty plea and thus waive his privilege against self-incrimination, his right to trial by jury and his right to confront his accusers, has never been resolved. Appellant points out that his competency to make such a waiver was not at issue when Drs. Camp and Lockhart determined appellant to be competent to stand trial. Likewise, Judge Harwell never made a finding on this issue. Further, appellant argues that the colloquy immediately preceeding his guilty plea cannot suffice to resolve this issue, since it consisted of no more than the usual inquiry concerning voluntariness, lack of coercion, and notice of the consequences and therefore did not extend into the area of his mental competency to abandon the most fundamental constitutional protections afforded a criminally accused.

Moreover, appellant wishes to bring to this Court's attention case law support for this argument which appellant inadvertently failed to cite in his original and reply brief. First is the case of Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed 2d 429 (1966). In that deci-

sion, the United States Supreme Court recognized a dist.nction between a defendant's mental competency to stand trial and his competency to waive his right to counsel at trial. The court held that a trial court finding that the defendant was competent to assist counsel in his defense, did not suffice as a finding that he was also competent to waive such a fundamental constitutional right as the right to the assistance of counsel.

Second is the case of Sieling v. Eyman, 478 F.2d 211 (1973). In that decision, the United States Court of Appeals for the Ninth Circuit held that, where a state court conducted an inquiry as to the mental condition of defendant who was found competent to stand trial but where the inquiry was not directed at his competency to waive his constitutional rights and enter a plea of guilty, said case must be remanded to state court to determine whether or not opinions of medical experts, who had examined defendant within a month before his plea were sufficient to support a finding that defendant was competent to plead guilty as well as to stand trial. The Ninth Circuit stated in Sieling, supra:

> [6] We think Westbrook makes it plain that, where a defendant's competency has been put in issue, the trial court must look further than to the usual "objective" criteria in determining the adequacy of a constitutional waiver. In Westbrook, supra, although the state court had, after hearing, concluded that the

> defendant was mentally competent to stand trial, the Supreme Court deemed it essential that a further "inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel..." was required. 384 U.S. at 150, 86 S.Ct. 1320. It was not suggested there, nor has it been in this case, that the state court's determination that the accused was competent to stand trial was incorrect. The clear implication, then, is that such a determination is inadequate because it does not measure the defendants capacity by a high enough standard. While the Court did not suggest a standard, it is reasonable to conclude from the Court's language that the degree of competency required to waive a constitutional right is that degree which enables him to make decisions of very serious import. Judge Hufstedler, in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970) has suggested the following standard: "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternative presented to him and to understand the nature of the consequences of his plea." We think this formulation is the appropriate one, for it requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced.

Further, in Rees v. Payton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed 2d 583 (1966), the United States Supreme Court held that Rees could not be permitted to withdraw his pending

certiorari petition, where his counsel had put before the court a question of Rees' competence until it could be determined:

> "whether he has a capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or, on the other hand, whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in this premises." 384 U.S. at 314.

Therefore, since the post-conviction hearing judge made no distinction between the competency to stand trail and the competency to plead guilty, the issue of appellant's competency to plead guilty has never been resolved. Moreover, unlike the above case law cited, appellant's case is a capital case and therefore a stricter standard of reliability is required (see Appellant's Brief at 58-60), for each of appellant's decisions are of the most serious import.

Further, if upon remand it is determined that a retroactive determination of appellant's competency to plead guilty cannot be satisfactorily be made, the only proper course would be a new trial. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Additionally, please note that the international news event of the slaying of former Beatle John Lennon has catapulted into world view this precise issue whether a stronger

showing of competence is required to accept a guilty plea than that required to bring a defendant to trial. On June 22, 1981 Mark David Chapman, the man accused of slaying Lennon, pleaded guilty. The trial judge accepted the plea based upon his belief that his finding that Chapman was competent to stand trial was dispositive of the issue of Chapman's competence to plead guilty and upon the required Boykin colloquy.

However, Chapman's attorney Jonathan Marks advised the court that his client's plea was against his advice and requested a hearing on the issue of Chapman's competence to plead guilty which has been set for August 24, 1981. This is the exact method according to which competent counsel should have proceeded in appellant's case. Further, in the absence of appellant's trial counsel requesting an evidentiary hearing on this issue, Judge Harwell should have required such a hearing sua sponte. In light of the certain fact that a series of New York and federal courts will address this issue, this Court should reconsider its denial of appellant's appeal on this issue pending additional guidance which may be forthcoming as a result of judicial decisions in the Chapman case.

(b) The issue of appellant's trial counsel's effectiveness was not addressed in this Court's opinion, State v.

The Supreme Court of South Carolina

The State,

Respondent,

v.

James Terry Roach,

Appellant.

ORDER

Notice to The Honorable William D. Leeke, Superintendent, State Penitentiary, setting execution date for James Terry Roach, was served on January 17, 1980. Thereafter, Order of this Court dated February 5, 1980 granted a stay of execution, pending further Orders of this Court, to enable the applicant to pursue such remedies as remain available by State post-conviction proceedings.

Post-conviction application was denied by the Richland County Court and, on appeal, the judgment of the lower court was affirmed in Memorandum Opinion No. 81-MO-197, filed July 17, 1981.

Application for Stay of Execution of Sentence of Death and Petition for Rehearing having been denied by this Court,

IT IS, THEREFORE, ORDERED

That the Clerk of this Court proceed under the terms of Section 17-25-370 of the 1976 Code.

J. Woodrow Lewis C.J.

Bruce Littlejohn A.J.

Ernest A. Finney, Jr. A.J.

Jos. R. Moore A.J.

[illegible] A.J.

Columbia, South Carolina

August 26, 1981.

CERTIFIED TRUE COPY.
Helen D. Sims
Deputy Clerk, S. C. Supreme Court

B Ress not participating

[illegible] not participating

EXHIBIT "C"

STATE OF SOUTH CAROLINA,)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

James Terry Roach, SK-3742,)
Applicant,)
)
-vs-) ORDER
)
State of South Carolina, et al,) 80-CP-40-0355
)
Respondents.)

This Post Conviction Relief Application was heard by the undersigned in April of 1980. This Order of disposition has been delayed because of several reasons among which are the necessity to study the voluminous exhibits offered by applicant, the press of trial assignments of the writer, the intentional withholding until after the completion of the matter In Re Walter W. Brooks before the Grievance Committee of the South Carolina Supreme Court and others.

The preparation and presentation of this matter by the attorneys appearing before me deserves commendation. It is with pride and pleasure that I speak for the State of South Carolina in congratulating all of these fine attorneys.

An Order has previously been filed in this Court by the undersigned allowing the hiring of certain experts to aid Applicant. If these experts have not been paid, counsel for Applicant should immediately file with the Court requests for payment. If they have previously been filed and not acted upon they should be refiled.

From the record it appears that Applicant is confined under the direction of the Commissioner of the South Carolina Department of Corrections pursuant to Order of Commitment of the Clerk of Court for Richland County, South Carolina. He was arrested on November 3, 1977, and charged with the crimes of armed robbery, kidnapping, criminal sexual conduct, two (2) counts of murder, and two (2) counts of conspiracy arising out of the October 29, 1977, deaths of Thomas Taylor and Carlotta Hartness. After arrest and before indictment, upon showing of indigency, the Honorable John Grimball, Judge of the Fifth Judicial Circuit, appointed as counsel Walter W. Brooks, Esquire

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EXHIBIT "D"

and Barry B. George, Esquire to represent him. John A. Mason, Esquire was appointed as back up counsel. Applicant was indicted at the November, 1977, term of the Court of General Sessions upon the previous named charges.

Notice was served upon Applicant that the State intended to seek the death penalty in the murder counts. Also served were Notices advising of the aggrevating circumstances which the State would seek to prove during the anticipated sentencing portion of the bifurcated trial. The sufficiency of these Notices is not questioned. They are in accordance with Sections 16-3-20 et seq of the 1976 Code of Laws, (Cum.Supp) for South Carolina, hereinafter, the Act.

The case was called for trial on Decmeber 12, 1977, before the Presiding Judge of the Fifth Judicial Circuit, the Honorable David W. Harwell. Applicant entered guilty pleas on December 13, 1977, to the charges of armed robbery, kidnapping, criminal sexual conduct and two (2) counts of murder. He plead nolo contendre to two (2) counts of conspiracy.

The trial judge, sitting without a jury, and without objection, conducted the sentencing procedure as required by the Act. He sentenced Applicant to death.

A timely appeal was filed in the Supreme Court of South Carolina. Prior to the docketing of the appeal, John K. Grisso, Esquire and O. Grady Guery, Esquire were substituted as counsel, they having been retained by the family of Applicant.

The Supreme Court affirmed the convictions and the imposition of the death penalty. The Court upheld the constitionality of the Act and dismissed the appeal.

A Petition for Writ of Certiorari was filed in the United States Supreme Court. It was denied.

Following the denial of the Writ, the Supreme Court of South Carolina ordered the execution of the sentence. The Order was stayed following the Application for Post Conviction Relief.

The Amended Application for Post Conviction Relief, hereinafter application, alleges his custody to be unlawful and/or his sentence to be invalid. I do not deem it necessary to set out the allegations or grounds of the

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application seratim. Reference is craved to the application.

The entire record in this matter has been carefully and thoroughly reviewed. The record includes, but is not limited to, the pleadings, the memoranda submitted, motions, testimony and exhibits offered and the oral arguments presented during the evidentiary hearing. Also reviewed were the transcript of the proceedings before the trial judge and the opinion of the South Carolina Supreme Court, State v. Shaw, et al ____S.C. ____, 255 S.E. 2d 799. I had the opportunity to observe the witnesses presented at the hearing and to pass upon their credibility; considering any interest they may have in the case, their bias or prejudice for or against Applicant, their opportunitites and abilities to observe, their displays of expertise and their demeanors on the witness stand.

Upon the foregoing, I now, in accoraance with Section 17-27-80 of the South Carolina Code of Laws (1976) make the following

FINDINGS OF FACT

and

CONCLUSIONS OF LAW

Turning first to allegations of ineffectiveness and inadequacy of counsel as to ability, preparation, presentation, etc. Essentially a claim that he was denied effective assistance of counsel. Based upon the total record it is my opinion that the efforts of counsel were within the range of competency demanded of attorneys in criminal matters. McMann v. Richardson, 397 U.S. 759 (1970) and Marzullo v. Maryland, 561 F.2d 540 (4th Cir.1977) Mr. Brooks, Mr. George and Mr. Mason were all practitioners in Richland County; Mr. Brooks for twelve years, Mr. George for seven years, the record does not show the length of service of Mr. Mason, but I know him to have been a practitioner and/or a Judge of the Richland County Court for more than twenty years.

I find that counsel conducted an adequate and exhaustive investigation into the facts of the case. Springer v. Collins, 586 F.2d 329 (4th Cir.1978) Coles v. Peyton, 389 F.2d 224 (4th Cir.1968). The testimony of counsel demonstrated that they discussed the case at length with Applicant, with the

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investigating officers, among themselves, with the parents of Applicant, with counsel for the co-defendant, Shaw. They applied for, attended, and conducted an extensive preliminary hearing. They examined the confessions of Applicant and his co-defendant, Mahaffey. The foregoing enumeration of counsel's efforts is not intended to be exhaustive, it merely is illustrative of their efforts.

During the investigation counsel were convinced the State had assembled strong and compelling evidence against Applicant. Counsel strongly suspected that the State was conducting plea bargaining with Mahaffey in return for his testimony against Applicant. This proved to be correct.

Applicant strongly relies upon the fact that counsel did not interview Officer Cronise. Counsel were aware of the circumstances of the alleged oral confession to Cronise, having been so informed by Applicant. In fact, Applicant testified before me that he had informed counsel of the circumstances of that statement. Mr. Brooks testified Applicant had recounted the circumstances. From the record it is clear that the State, without the confessions, could have proven that Applicant was present at the death of the two victims. The only question remaining was who fired the shots. Applicant's alleged statement was exculpatory in that regard, he claimed Shaw fired all of the shots.

It does not appear that counsel's failure to move to suppress the statement was because of ignorance, mistake ineffectiveness or inadequacy. On the contrary, it appears to have been an informed judgment, made by counsel after discussion with Applicant and after the evaluation of the options open to them. In addition, I heard the testimony of the several witnesses and find beyond a reasonable doubt that the confession was not a product of illegal or improper conduct by the officers. Although Applicant originally requested the services of an attorney, I am convinced that he later retracted that request while being transported from Saluda to the headquarters of South Carolina Law Enforcement Division, hereinafter SLED, see the testimony of Cronise who was called as a witness by Applicant. After Applicant had been fully and properly advised of his rights under Miranda v. Arizona, 396 U.S. 868 , I find beyond a reasonable doubt that he made a statement and such was

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made freely and voluntarily without hope of reward nor in fear of violence. Michigan v. Mosely 423 U.S. 96 (1975).

In further attack upon the confession aspect, it is Applicant's position that his guilty plea was involuntary and constitutionally invalid because it was entered based upon a confession made while in illegal custody since his parents had not been notified.

He relies on his interpretation of Section 14-21-590, Section 43-17-10 of our Code for 1976 as amended and on In re Williams, 265 S.C. 296 (1975). His reliance is ill placed. He was born on February 16, 1960, and was seventeen at the time of his arrest. He gave a confession to Lieutenant Walter Powell, acknowledging his presence at the scene of the crimes but denying having raped or shot. He called his parents after the confession and his father came to Columbia a few days later. The law enforcement officers did not notify his parents of his arrest nor of his confession.

Section 14-21-10 et seq, supra provides that the family court has original jurisdiction and sole jurisdiction for initiatory action against a child who has violated the law. It provides for the transfer of certain cases to the Court of General Sessions. It provides that a child's parents be informed as soon as possible after arrest. It defines a "child" as a person less than seventeen years of age. Applicant was not a "child" within the meaning of these statutes. In re Williams, supra held that the admissibility of an inculpatory statement of a fifteen year old depended upon the totality of the circumstances, it is of no help to Applicant here.

Section 43-17-10 gives the Probate Court or Recorders Court certain authority over criminal conduct of those under eighteen years of age. This Section, in my opinion, conflicts with 14-21-10 et seq, which was enacted subsequent to it. Under well established rules of construction the enactment of 14-21-10 et seq invalidated 43-17-10. There was no evidence to show that Applicant's decision to plead was based on nor influenced by the Statement to Powell.

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He also alleges that his guilty plea was involuntary because it was based upon an involuntary confession. Suffice it to say that voluntariness must be determined by the totality of the circumstances. Fikes v. Alabama,

352 U.S. 191 (1957), Davis v. North Carolina, 384 U.S. 737 (1966). The testimony of Lieutenant Powell was credible and leaves no doubt in my mind as to the protection of the rights of Applicant nor of the voluntariness of the statement.

Applicant pleaded guilty and his edited statement was admitted into the record (Tr. 117 - 130). The trial judge thereupon found the statement to have been voluntarily made (Tr. 120 - 121). The statement placed the blame for the firing of all the shots on a co-defendant. It was counsel's opinion that the confession was not subject to suppression, and such judgment was made after a review of the facts as related by Lieutenant Walter Powell of SLED, an officer whom counsel testified cooperated with them. But more importantly, by Applicant. The written statement given at SLED and the oral statement given en route were both freely and voluntarily given after the police had fully informed Applicant of his constitutional rights. He knowingly waived such rights.

Complaint is made in regard to the failure of counsel to make proper pretrial motions and also to the withdrawal of some which were made:

The motion to change venue was withdrawn because counsel felt the potential venire of Richland County made it one of the better suited jurisdictions in which to try a capital case. Such opinion was supported by testimony. Additionally, I take judicial notice that Richland has as broad a cross section of votes as any county of the state. It should not be overlooked that counsel had practiced in Columbia and were more familiar with the potential venire of Richland than any other county.

Continuance was withdrawn because the psychological aspect of the time was right, two weeks prior to Christmas. Such a decision is an acceptable strategical ploy

Severance was withdrawn on the basis of counsel's information that co-defendant Shaw would plead guilty. He did. The hearing of the motion would have been superfluous. The failure to renew was based on the judgment that it was to Applicant's advantage to participate in a joint sentencing hearing with Shaw. It forestalled Shaw from testifying against him as he

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might have done at a subsequent time and it gave counsel, in their opinion, a better opportunity to convince the judge that Applicant was under the dominion of the older more experienced Shaw.

It should also be said of severance and continuance, these matters were also raised in allegations 23 and 24, that the withdrawal of the motions prior to trial and the failure to raise the questions in the appeal to the Supreme Court closes the door in this Post Conviction Relief matter, Ashley v. State, 260 S.C. 463 (1973).

In regard to the withdrawal of the motions discussed above I find that these withdrawals were based upon and the result of deliberate and informed judgment of counsel and within the range of competency required, Marzullo, supra.

Failure to advise and to move to quash the indictment on the grounds that females were systematically excluded from the Grand Jury has no support in the record and is therefore dismissed. Such a bold and unsupported allegation can not sustain an allegation of uneffective representation. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975).

The evidence convinces me that counsel made adequate preparation for trial, seeking and recovering appropriate and sufficient experts. Complaint as to the psychiatrist is based upon the fact that he would not testify favorably after having examined applicant. No attack is made upon Dr. Lockhart's competency. It is the position of Applicant that counsel should have found a psychiatrist who would have testified favorably. Such a position is untenable in view of the evidence.

The allegation regarding the failure of counsel to have Applicant examined by a specialist in Huntington's Chorea has given me more problem than any other. Dr. Edward W. Camp, III, testified as to this disease among other things. Although I sustained the objection of Respondents to the alleged Order of Judge Chapman I received the impression that Dr. Camp may not have been the expert he once was thought to be. Be that as it may, it remains that the trial judge found mitigational circumstances which were based on Dr. Camp's testimony. I find that the selection of Dr. Camp as a witness was

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proper under Marzullo, supra. In favor of life, and to be sure that every right of Applicant was protected, I appointed as the Court's witness and Ordered Dr. Charles M. Still, who present counsel for Applicant introduced as the leading authority on Huntington's Chorea, to examine Applicant and his mother.

I was greatly impressed with the testimony of Dr. Still and with his desire to be helpful to Applicant and to the Court. Dr. Still's testimony is that the mother is suffering from Huntington's Chorea and that it may be transmitted from her to Applicant genetically. He found no evidence that Applicant has Huntington's Chorea and he was unable to advance an opinion that it would most probably develop. It is Dr. Still's testimony that Applicant has always had and will always have a fifty per cent chance of having Huntington's Chorea. It therefore follows that from a medical diagnostic standpoint the testimony of Dr. Still and Dr. Camp are not materially differen

Was his guilty plea involuntary because he was incapable by reason of his mental and emotional deficiencies? He relied on Dr. Diane Follingstad and Dr. Harold Morgan to support this allegation.

Dr. Follingstad was of the opinion that he was a borderline mental retardate unable to understand abstract concepts and incapable of entering a knowing and intelligent plea. He was able to tell right from wrong.

Dr. Morgan agreed as to the classification of Applicant but felt he could understand abstract concepts when they were explained in his own language.

I had the opportunity of hearing, and seeing, Applicant on the witness stand. He was able to understand many abstract questions put by his present counsel and to respond intelligently to questions about legal concepts, such as trial by jury and unanimous jury verdict with apparent ease. He also responded to questions on cross-examination which were frequently abstract dealing with various legal issues.

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CTS

The test for competency to enter a plea of guilty is set forth in State v. Lambert, 266 S.C. 574, 225 S.E. 2d 340 (1976) as follows:

> While low intelligence or limited education may cause an appellate court to review the defendant's plea carefully, it does not necessarily preclude a valid plea. Wood v. Cox, 316 F.Supp. 1336, 1337 (W.D.Va.1970).

The testimony of Applicant related in detail his recollection of the events leading up to the criminal acts with which he was charged, including such incidental features as seeing a movie and conversation with a victim. The State Hospital found him to be competent to stand trial. Dr. Morgan testified he understood the difference between right and wrong. While I personally disagree with the M'Naughton Rule, it is the law in our State. But, even were it not, I am convinced that Applicant understood what he was doing and could have refrained. I find that Applicant was able to understand the nature of the proceedings against him, he was capable of assisting in his defense. He was unable to show, by a preponderance of the evidence, that his allegation to the contrary is with merit.

The failure of counsel to engage the services of a pharmacologist to testify regarding the alleged voluntary ingesting of drugs is advanced. I was impressed with the qualifications of the pharmacologist who testified, but not with what his aid would have been had he testified at sentencing. His testimony that the drug which Appellant claims to have had ministered was Phencyclidine (P.C.P) was, at best, speculative, it was inconsistent with Appellant's ability to have functioned and to have had such vivid recall of the details of the date upon which the crimes were committed. Mahaffey, too, according to the record, took the same drug and also recalled the fine details of the day.

Two other factors come into play regarding the "drug" allegations. In addition to the allegations of failure to obtain a pharmacologist Applicant feels counsel to have been ineffective in not having pursued a defense of insanity because of the drug use. (1) Until the day before the trial he had told counsel that the only drugs he had used were marijuana and beer. Counsel can not be faulted for Applicant's failure to divulge. (2) The law is clear that the voluntary ingestion of drugs is no defense to a crime. State v. Crocker 272 S.C. 344 (1979) and State v. Vaughn, 268 S.C. 119 (1977). Springer v. Collins, 586 F.2d 329 (4th Cir. 1978).

#9
CTS

I am convinced that counsel had prepared themselves on the law as best they could. This was one of the first cases presented to the Circuit Courts under the Act. Present counsel does not impress me with their position that

counsel, on cross-examination before me, could not recall names of cases or citations. Professor Farrell did a wonderful job but he loses sight of the fact that trial counsel did their research on these matters two and a half years before he did. They had prepared themselves on the facts. More than one hundred voir dere questions were prepared. Additional jury information was being obtained. I am further convinced that the election to plead guilty was voluntarily, knowingly and advisidly made by Applicant with the consent of his parents, all of whom had been fully advised by counsel that counsel was ready for trial and what the possible consequences of trial and or plea would be; i. e., the death penalty or life imprisonment. As to any assurance by counsel that he would receive a life sentence upon entering a guilty plea, this is completely refuted by the record (Tr. 50,51). All Applicant had was his own expectations and hopes, I am sure this was shared by his parents and counsel. It is not enough. U. S. v. Futeral 539 F.2d 329 (4th Cir. 1975).

The record before Judge Harwell is convincing to me that counsel conducted themselves properly at all stages of the plea and sentencing. Present counsel would have me give great weight to the length of the mitigational evidence. Quanity versus quality does not impress me.

There is no merit in the allegations regarding a paucity of time in which to have procured expert testimony. It was procured, unfortunately for Applicant, it was not favorable.

Applicant alleges he was not permitted to take the stand. The record shows the contrary to be true. He made his own decision.

I found the testimony of the several lawyers who testified to be unpersuasive although I have great respect for the ability of some of them. Unfortunately, I feel that their expert opinions were based greatly on the result. They did not participate in the investigation, did not talk to the parents, the Applicant, the doctors, were not "in the pit". They have at best read the record and passed an opinion on what they might have done. Oh how great is hindsight!

#10 CTR

It is alleged that the trial judge failed in his duty to require Applicant to recite into the record his understanding of the rights he was waiving and to make proper inquiry of counsel as to their competent handling

of the matter. The trial judge is free to utilize any appropriate procedure for determining the accuracy of a guilty plea. State v. Armstrong, 263 S.C. 594, 211 S.E. 2d 889 (1975). The question is, does the record establish that a guilty plea was voluntarily and understandably made. Boykin v. Alabama, 395 U.S. 238 (1969). Applicant reads into Boykin that a trial judge must direct a defendant's attention to each and every constitutional right and receive a narrative type response of his understanding of each, then obtain a separate waiver of each. I disagree. State v. Lambert, supra, 578, Wade v. Coiner, 468 F. 2d 1059 (4th Cir. 1972). The trial judge has discretion to make such inquiry of counsel as he deems proper to assist him in determining if the plea be free and voluntary.

The record convinces me that the pleas entered meet the standards of Boykin, supra (Tr.39 et seq.). Even though Applicant testified before me that he entered his plea because counsel told him he would get a life sentence and that he did not understand the inquiries put to him by the trial judge, a reading of the record convinces me that his testimony before me is incredible. I reject his testimony as to this conflict. He has failed to convince me that his responses at the plea hearing were not freely, voluntarily, intelligently and knowingly made. I agree with our Court in its statement in State v. Shaw, supra that Judge Harwell went the second mile.

As to Applicant's positions that the death sentence was unconstitutionally imposed because there was no specific finding that he personally took life, and that he was sentenced upon a finding of vicarious liability; he relied upon Lockett v. Ohio, 438 U.S. 586 (1978) and Green v. Georgia, ____U.S.____, 99 S.Ct. 2150 (1979). Lockett and Green are not apposite.

In Lockett there was no evidence that the defendant took life. In Green defendant was not allowed, because of an evidentiary ruling, to present evidence which would have shown alibi.

11
CTS

The testimony before the trial judge shows Applicant to have been a triggerman and our Supreme Court so found in State v. Shaw, supra. This is also dispositive of Applicant's position that the trial judge should have considered this alleged failure to take life as a mitigating factor. Jacobson v. Virginia, 25 Cr.Law 3229 (June 1979)

The fact that Judge Harwell failed to find that Applicant was an accomplice in the murder committed by another and that his participation was relatively minor constituted to my mind that he found to the contrary. I feel that this meets the test of Lockett v. Ohio, supra.

There are several allegations as to the errors of the South Carolina Supreme Court in its consideration of Appellant's appeal. Among these allegations are the failure to consider vicarious liability, the error in finding that the record demonstrated criminal intent, the misconstruction of the Act in allowing the introduction of photographs, etc., the failure to be able to make proportionate comparison of the sentence against similar cases, and that cases in which defendants plead guilty were excluded. I do not treat these allegations in a cavalier fashion. The simple proposition of law is that the review of a Supreme Court decision is not for this Court. Simmons v. State 264 S.C. 417, 215 S.E. 2d 883 (1975). During the hearing I repeatedly asked Professor Farrell to supply me with any authority to support his position that I might review Shaw. He furnished none, nor have I been able to find any. But, if I had such authority, I would not set aside the opinion of our Court, I would adopt it. These allegations are rejected.

The trial judge in this matter sat as the judge of both the law and the facts. It was for him to judge the credibility of the witnesses. The reliability of the testimony of Robert Williams rested upon the trial judge.

I have reviewed the television tapes and news clippings introduced and recounted the testimony regarding media coverage and "inflammatory pretrial climate". I am unimpressed. While the coverage, particularly of the press, was extensive, I did not feel inflamed in reading it. Nor do I feel that Judge Harwell of Florence would have been inflamed. I do not feel that Applicant carried the burden of proof in showing that the publicity was such as to have been inherently prejudicial and would have precluded him from receiving a fair and impartial trial. Sheppard v. Maxwell 384 U.S. 333 (1966).

#12
CTS

I doubt that the question of the unconstitutionality of the Act is properly before me. But if it is, the question presented was decided adversely to Applicant in Proffitt v. Florida, 428 U.S. 242 (1976).

The position of Applicant regarding disproportion of the sentence bein unconstitutional because of a co-defendant brainwashing him over a two week period and because of the trial judge's finding that he suffered from diminis mental capacity and was under the influence of hallucinogenic drugs, involuntarily taken and was acting under the domination of another person at the time precluded a finding of criminal intent, is rejected. From the evidence it does not appear to me that any one was a dominant figure. However, the trial judge found as a mitigating circumstance that Applicant had acted under duress or under the domination of another person; that he was under the influence of extreme mental or emotional disturbance and that his ability to appreciate the criminality of his conduct or to conform to law was substantially imparied. He also considered the age, mentality and lack of a history of violence as mitigating. Yet he invoked the death sentence. All of this was before the Supreme Court. It was considered and the ruling was adverse to Applicant. It is not properly before me, infra. But, if it were, I woul find it not to be disproportionate. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, supra; Juret v. Texas, 428 U.S. 262 (1976).

I completely reject the position of Applicant regarding the statistica proof that the death penalty has been disproportionally applied upon individu who commit aggrevated murder on white victims under our Act. The testimony offered was not credible. The witnesses did not consider all of the availa parameters. The writer of this opinion has probably tried more capital cases under the Act than any other judge in our state. My personal experience refutes the offer of proof. I have tried two blacks for murder of whites and a white for murder of a white who were given life sentences. On the other hand, I have tried two whites for murder of a black and a white for murder o a white who were given death sentences. These jury verdicts were, each, in my opinion appropriate under the facts of the cases presented.

#13
CTS

Was the imposition of the death penalty as applied to Applicant arbit and capricious? This also was answered by the Supreme Court. However, additional testimony was presented before me and I feel constrained to make an individual evaluation of the sentence.

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The writer is opposed to the death penalty. Had I been a member of the General Assembly I would have voted against the Act. In each case that I have tried, and in this case, I have carefully construed every thing strictly against the State and in favor of Applicant.

Being familiar with all that occurred before the Trial Court, the Supreme Court and this Court, I find beyond a reasonable doubt that Applicant's sentence was the result of careful deliberation and was neither arbitrary nor capricious. It meets the tests laid down by the United States Supreme Court in all cases since Gregg v. Georgia, supra.

During the hearing I would not allow the introduction of the matter In re Brooks before the Grievance Committee of our State into evidence. I feel my ruling to have been correct. Following the decision of our Court In re Brooks, Opinion No. 21220, filed May 6, 1980, Smith's Advance Sheet # 18, I subpoenaed these records. I have studied the complete record in the matter. I shall not review it here. Suffice it to say that there is nothing in that record which shows, nor indicates, any dereliction of duty in this case, nor is there any credible evidence that shows Mr. Brooks to have failed to adequately and effectively represent his clients. I do appreciate that the disbarment proceeding goes to the credibility of Mr. Brooks as a witness. I have, with soul searching, considered it and still give credibility to the testimony of Mr. Brooks before me. It was corroborated by the testimony of Mr. George and Judge Mason, both of whom I find to have given credible testimony.

Looking to the totality of the circumstances, and perhaps redundantly, I find and conclude

CAS

That trial counsel's representation of Applicant ~~were~~ was within the range of competency demanded. McMann v. Richardson, 397 U.S. 759 (1970); Marzullo Maryland, supra.

That the alleged mental and emotional condition of Applicant was not such as to prohibit him from understanding or appreciating his position. That he made informed, voluntary and knowing waivers of his constitutional rights and so entered his pleas.

#14
CTS

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That there was no error by the State regarding the failure to notify his parents of his arrest or confession.

That I have no jurisdiction to review the decision of our Supreme Court in Shaw, but if I did, I would affirm it.

That his Honor Judge Harwell made no reversible errors in his handling of the taking of the pleas, the sentencing hearing nor the imposition of sentence.

That Applicant has not met the burden of showing by a preponderance of the evidence that there are any meritorious grounds for relief under the Uniform Post Conviction Procedure Act, §§ 17-27-10 et seq., Code of Laws of South Carolina, 1976. It is, therefore,

ORDERED:

(1) That the Application for Post Conviction Relief, as amended, be dismissed and denied with prejudice; and

(2) That the Applicant, James Terry Roach be, and he hereby is, remanded to the custody of the Respondent.

Clyde A. Eltzroth

CLYDE A. ELTZROTH, PRESIDING JUDGE

Hampton, South Carolina.
July 9, 1980.

#15
CTB

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Joseph Carl Shaw and James Terry Roach, ... Appellants.

Appeal From Richland County
David W. Harwell, Judge

Opinion No. 20973
Filed May 30, 1979

AFFIRMED

Kermit S. King, Dallas D. Hall, and Thomas W. Vernon, of Lewis, Lewis & Robinson, for appellant Shaw; Walter W. Brooks, John A. Mason, and Barry B. George, for appellant Roach, all of Columbia.

Attorney General Daniel R. McLeod, Assistant Attorney General Brian P. Gibbes and Solicitor James C. Anders, all of Columbia, for respondent.

GREGORY, A. J.: Appellants Joseph Carl Shaw and James Terry Roach pled guilty to the murders of Thomas Taylor and Carlotta Hartness and each was sentenced to death. The case is before this Court on direct appeal and for mandatory review of the death sentences.

This is the first capital case reviewed under our current death penalty statutes, Section 16-3-20 through Section 16-3-28, 1976 Code of Laws of South Carolina, Cum. Supp. 1978.

FACTUAL SETTING

Shaw, Roach, and Ronald Eugene Mahaffey spent the morning of Saturday, October 29, 1977, "shooting up" with drugs and drinking beer. At approximately 1:00 that afternoon the three decided, in Mahaffey's words, "to see if we could find a girl to rape."

Shaw, Roach, and Mahaffey drove to Polo Park, a baseball park, located off Alpine Road northeast of Columbia. There they saw a parked late model car occupied by Thomas Taylor, aged 17, and Carlotta Hartness, aged 14.

Shaw, who was driving, pulled up beside the parked car in such a way that Roach, who was in the front passenger's seat, was directly across from Taylor, the driver of the parked car. Mahaffey was in the back seat.

At a prearranged signal from Shaw, Roach leveled a .22 caliber rifle through the car window at Taylor and demanded money. Taylor gave the three his wallet.

Shaw and Mahaffey got out of their car and Mahaffey took the keys out of Taylor's car. Shaw ordered Ms. Hartness out of Taylor's car and forced her into the back seat of his car with Mahaffey. Shaw got back into his car, turned to Roach and said, "Ok, now." Roach then shot and killed young Taylor who was still sitting in his parked car.

Ms. Hartness was carried to a dirt road a short distance away where she was forced to disrobe. Shaw raped Ms. Hartness while Roach and Mahaffey looked through Taylor's wallet. Roach then raped Ms. Hartness. Shaw raped Ms. Hartness a second time while Mahaffey forced her to perform oral sex. Mahaffey then raped Ms. Hartness while Shaw forced her to perform oral sex.

EXHIBIT "E"

Shaw asked who would shoot Ms. Hartness and Roach volunteered. Shaw instructed Ms. Hartness to put her face to the ground but she refused. Shaw drew a circle in the dirt and drew an "X" inside the circle and told Ms. Hartness to place her head in the circle. Ms. Hartness again refused and pleaded for her life. Shaw told Ms. Hartness a third time to place her head on the ground and she complied. Roach shot Ms. Hartness in the head, causing her body to convulse. Shaw then took the rifle from Roach and fired into Ms. Hartness's head, killing her.

Shaw, Roach, and Mahaffey left the scene, disposed of the rifle and bullets, and returned to Polo Park to satisfy themselves that Taylor was dead.

Later that night Shaw returned to the scene of Ms. Hartness's murder and mutilated her body by cutting her breasts and pubic area with broken glass and by inserting sticks in her vagina and anus.

Shaw, Roach, and Mahaffey were arrested on November 3, 1977. Each was indicted for two counts of murder, two counts of conspiracy, rape, kidnapping, and armed robbery. The State elected to seek the death penalty for Shaw and Roach and served the Notices required by Section 16-3-20(B) and Section 16-3-26(A), Cum. Supp. 1978.

As the result of plea negotiations the State did not seek the death penalty against Mahaffey in exchange for his testimony against Shaw and Roach.

On December 12, 1977 Shaw pled guilty to all charges. Roach pled guilty to two counts of murder, rape, kidnapping and armed robbery, and pled nolo contendre to two counts of conspiracy.

A separate pre-sentence hearing was conducted as required by Section 16-3-20(B), Cum. Supp. 1978, on December 14, 15 and 16, 1977. At this hearing evidence in extenuation, mitigation and aggravation was introduced. The trial judge found aggravating circumstances and imposed sentences of death upon both Shaw and Roach.

GUILT DETERMINATION

No issue is raised on appeal regarding the validity of appellants' guilty pleas. We have reviewed the record, however, and are satisfied the guilty pleas were properly taken. The able trial judge went the second mile to insure that the guilty pleas were given knowingly and voluntarily.

CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

Our present death penalty statutes, Section 16-3-20 through Section 16-3-28, Cum. Supp. 1978, were enacted as Act No. 177 of the 1977 Acts of the General Assembly. Act No. 177 of 1977 was patterned after the death penalty statutes of our sister state Georgia.

The constitutionality of Georgia's death penalty statutes was considered by the United States Supreme Court in Gregg v. Georgia, 426 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). While opinions may differ as to the parameters of the Supreme Court's holding in Gregg, it is indisputable that in Gregg the Court approved Georgia's death penalty statutes.

We now consider whether this State's statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny.

South Carolina's statutory complex, which is found at Appendix A to this opinion, retains the death penalty only for the crime of murder.[1] A capital defendant's guilt or innocence is determined in the traditional manner, either by a judge or jury, in the first stage of a bifurcated trial.

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[1]Section 16-3-10, 1976 Code, provides:
"Murder" is the killing of any person with malice aforethought, either express or implied.

The mandatory sentence review is in addition to, but may be consolidated with, any direct appeal by the convicted capital defendant. Section 16-3-25 (F), Cum. Supp. 1978.

Mr. Justice Stewart, speaking for the Court in Gregg, summarized the procedural conditions necessary to impose the death penalty:

> In summary, the concerns expressed in Furman v. Georgia, [408 U.S.238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. 428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

Commenting on Gregg, supra, Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, stated in Lockett v. Ohio, _____ U. S. _____, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978):

> The plurality [in Gregg] reasoned that to comply with Furman, sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, at 188, 49 L.Ed.2d 859, 96 S. Ct. 2909. In the view of the plurality, however, Furman did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," id., at 189, 49 L.Ed.2d 859, 96 S.Ct. 2909, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the cases in which it is not." Id., at 188, 49 L.Ed.2d 859, 96 S.Ct. 2909. The plurality also concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978, in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case." Id., at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978; see Roberts (Harry) v. Louisiana, 431 U.S. 637, 52 L.Ed.2d 637, 97 S.Ct. 1993, 5 Ohio Ops. 2d 252 (1977); Jurek v. Texas, 428 U.S. 262, 271-272, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976). ___U.S. at _____, 98 S.Ct. at 2963, 57 L.Ed.2d at 987-988.

The statutory death penalty complex adopted by the General Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in Gregg. The new death penalty procedures focus the sentencing authorities' attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. The guidance provided by the sentencing procedures reduces the likelihood that the sentencing authority will impose a sentence of death capriciously. Additionally, the requirement that the sentencing authority specify the factors it relied upon in reaching its decision ensures that meaningful appellate review will be available to every capital defendant.

A

Appellants Shaw and Roach contend, as did the capital defendant in Gregg, that the unbridled discretion of the Solicitor to extend mercy to any capital defendant renders the statutory complex facially invalid. This issue was decided adversely to appellants by Gregg and does not merit further consideration by this Court.

Appellants contend, however, that on the facts of this case the decision of the Solicitor to seek the death penalty against them was arbitrary and capricious in view of the Solicitor's decision not to seek the death penalty against Mahaffey. Appellants contend there was no basis for distinguishing them from Mahaffey for purposes of seeking the death penalty. We disagree.

While these three defendants are equally guilty of the crime of murder as defined by the laws of this State, they are not ipso facto deserving of the same punishment. See Lockett v. Ohio, supra.

There is testimony in the transcript of record demonstrating that both Shaw and Roach were triggermen. There is no evidence that Mahaffey was a triggerman. This one fact is sufficient to distinguish Mahaffey from Roach and Shaw for purposes of the death penalty. Additionally, as the only witnesses to these crimes were killed, the State's case against Shaw and Roach would have been substantially impaired without Mahaffey's testimony.

The Solicitor chose to bargain with Mahaffey rather than Shaw or Roach because it was unlikely a death sentence would be imposed on Mahaffey. The decision of the Solicitor to not seek the death penalty for Mahaffey does not, on these facts, require a similar consideration for Shaw and Roach.

B

Appellants also contend the statutory complex is constitutionally defective because it does not assign numerical values to the aggravating and mitigating circumstances so that the sentencing authority can determine when the mitigating circumstances outweigh the aggravating circumstances. This issue was decided adversely to appellants in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

C

Appellants contend the statutory circumstances of aggravation have "no rational basis, but are merely arbitrary classifications decided upon by the drafters of the statute." Appellants do not challenge any particular circumstance of aggravation, but argue against the statutory complex as a whole.

We are not impressed with this argument. The General Assembly has retained the death penalty only for murder, and only then when the murder is committed under at least one of seven (7) specific aggravating circumstances. The list of aggravating circumstances adopted by the General Assembly is not arbitrary on its face, and appellants do not contend that any particular circumstance of aggravation has been rendered arbitrary by its application to them. We resolve this issue adversely to appellants.

We conclude, therefore, that Section 16-3-20 through Section 16-3-28, Cum. Supp. 1978, are constitutional, and that a sentence of death may be lawfully imposed pursuant to the statutory complex.

METHOD OF EXECUTION

Appellants next challenge the method of execution employed in this State.

Section 24-3-530, 1976 Code, provides that all persons who are convicted of a capital crime and receive a sentence of death "shall suffer such penalty by electrocution."

The argument that the use of electrocution as a means of inflicting the death penalty constitutes cruel and unusual punishment has been decided adversely to appellants by the United States Supreme Court in In Re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). See also: McElvaine v. Brush, 142 U.S. 155, 12 S.Ct. 156, 35 L.Ed. 971 (1891); Louisiana Ex Rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), reh. denied, 330 U.S. 853, 67 S. Ct. 673, 91 L.Ed. 1295; Anno. 51 L.Ed.2d 886; Anno. 30 A.L.R. 1452.

INTRODUCTION OF EVIDENCE

At the pre-sentence hearing appellants objected to the introduction by the State of any evidence in aggravation of punishment. Appellants argued that their pleas of guilty established the circumstances of aggravation of kidnapping, rape and armed robbery beyond a reasonable doubt and thereby rendered any evidence in aggravation inflammatory and prejudicial.

The Supreme Court has indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. Gregg, supra. The sentencing authority should have as much information before it as possible:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. Lockett v. Ohio, supra, ____U.S. at ____ 98 S.Ct. at 2965, 57 L.Ed.2d at 990.

In (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed2d 974 (1976) the Supreme Court struck down Louisiana's mandatory death penalty statute because it did not permit consideration of the circumstances of the particular offense. Speaking for the Court, Mr. Justice Stewart stated:

> The constitutional vice of mandatory death sentence statutes - lack of focus on the circumstances of the particular offense and the character and propensities of the offender - is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, . . . underscores the rigidity of Louisiana's enactment. . . . 428 U.S. at 333, 96 S.Ct. at 3006, 49 L.Ed.2d at 981-982.

Here, the only information possessed by the sentencing authority prior to the introduction by the State of evidence in aggravation was that appellants were guilty of murder committed while in the commission of rape, kidnapping, and armed robbery. The diversity of circumstances under which murder can be committed while in the commission of rape, kidnapping, and armed robbery requires that the sentencing authority be given as much information as possible about the circumstances of the particular crime.

The trial judge correctly permitted the State to introduce evidence to establish the circumstances of aggravation.

It is further contended, however, that certain specific items of evidence were improperly admitted at the pre-sentence hearing.

The State was permitted, over appellants' objections, to introduce seven photographs into evidence at the pre-sentence hearing.

Three of the photographs show Ms. Hartness's body as it was found at the scene of her murder. The fourth photograph shows a close-up view of the disfigurement to her left breast, and the fifth photograph shows a close-up view of the disfigurement to her pubic area. The sixth photograph is of a piece of glass that was removed from Ms. Hartness's pubic area. The seventh photograph is of a feminine tampon as it was found at the scene of the murder.

These photographs illustrate not only the scene of the crime as found by the law enforcement officers, but they also depict the post-mortem abuse of Ms. Hartness's body by Shaw.

Appellants argue the photographs should not have been admitted at the pre-sentence hearing because post-mortem abuse is not a statutory circumstance of aggravation.

Appellants have misinterpreted the statutory complex.

The General Assembly adopted this State's current death penalty statutes in an attempt to comply with the guidelines laid down by the United States Supreme Court in Gregg. Perhaps the most emphasized of these guidelines is the need for an individualized sentence, considering both the circumstances of the crime and the individual defendant.

The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding. The pre-sentence hearing is for the introduction of additional evidence in extenuation, mitigation or aggravation of punishment. The statute does not exclude from the consideration of the sentencing authority any evidence received at the guilt determination stage. To the contrary, the sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with additional evidence, if any, in extenuation, mitigation or aggravation of punishment.

Here, the guilt determination stage consisted solely of the guilty pleas of appellants. No testimony was taken.

At the pre-sentence hearing testimony and other evidence, including the challenged photographs, was introduced by the State to give the sentencing authority as much information as possible about the particular circumstances of the crime. The challenged photographs were clearly admissible to illustrate the crimes committed against Ms. Hartness. State v. Bellue, 260 S.C. 39, 194 S.E.2d at 193 (1973); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972). They were also admissible to substantiate the State's assertion that Shaw returned to the scene of the Hartness murder.

The evidence that Shaw committed acts of post-mortem abuse to Ms. Hartness's body was likewise admissible not only as a circumstance of the crime, but also as evidence of Shaw's character. The acts of post-mortem abuse were of a violent sexual nature and bore a logical connection to the earlier rape of Ms. Hartness.

The photographs depicting the post-mortem abuse to Ms. Hartness's body were properly admitted into evidence and considered by the sentencing authority, not as additional evidence in aggravation of punishment, but as evidence of the circumstances of the crime and the characteristics of the individual defendant Shaw.

SENTENCE REVIEW

The sentences of death imposed against appellants must conform to the requirements of Section 16-3-20, Cum. Supp. 1978. The duty falls to this Court under Section 16-3-25, Cum. Supp. 1978, to review the entire record and transcript, the report of the trial judge,[3] and the arguments of counsel to determine (1) whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing authority's findings of statutory aggravating circumstances; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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[3]The reports of the trial judge in this case are found at Appendix B and Appendix C to this opinion for appellants Shaw and Rosch respectively.

Product of Passion

The sentences of death were imposed by the trial judge without the intervention of a jury. Before imposing sentence the trial judge found as an affirmative fact that the death penalty was warranted by the evidence and that its imposition was not influenced by passion, prejudice or any other arbitrary factor.

Appellants present no argument that the death sentences were imposed in violation of this requirement. We have carefully reviewed the sentences and are satisfied they were not influenced by passion, prejudice or any other arbitrary factor but were the products of sound and careful deliberation based on the evidence.

Circumstances of Aggravation

The sentencing authority imposed the sentences of death after finding the following three statutory circumstances of aggravation beyond a reasonable doubt:

1) Murder committed while in the commission of rape;

2) Murder committed while in the commission of kidnapping;

3) Murder committed while in the commission of armed robbery.

Appellants pled guilty to the offenses of murder, rape, kidnapping and armed robbery. The evidence supports their pleas of guilty as well as the finding of the sentencing authority that the murders were committed while in the commission of the other three crimes to which appellants pled guilty.

We have carefully reviewed the sentences and are satisfied that the evidence supports the sentencing authority's findings of statutory aggravating circumstances beyond a reasonable doubt.

Sentence Comparison

As an additional check against the random imposition of the death penalty, this Court is directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statutes[4] and are satisfied that there are no similar cases against which the proportionality of the sentences imposed upon appellants can be measured.

The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

The current death penalty statutes comply with the guidelines set out by the United States Supreme Court in Gregg. We have considered and overruled each assignment of error by appellants and have completed the statutorily mandated sentence review. Additionally, we have searched the record in favorem vitae for any prejudicial error and have found none.

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[4]Capital cases tried and reviewed under prior death penalty statutes are definitionally different from cases tried under the current statutes and provide no basis for meaningful sentence review. See Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978); and Waye v. Commonwealth, 251 S.E.2d 202 (Va. 1979).

Accordingly, the sentences of death imposed upon appellants Joseph Carl Shaw and James Terry Roach are affirmed.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, NESS and RHODES, JJ., concur.

APPENDIX - A

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. *Provided*, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(b) Mitigating, circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

§ 16-3-25. Punishment for murder; review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

§ 16-3-26. Punishment for murder; notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the Solicitor seeks the death penalty, he shall notify defense attorney of his intention to seek such penalty at least 30 days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

The State shall pay from funds appropriated for the defense of indigents such fee and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate.

(C) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed two thousand dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services *nunc pro tunc*.

§ 16-3-27. Punishment for murder: pregnant females.

In no case and under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition or anytime following thereafter for a period of at least nine months.

§ 16-3-28. Punishment for murder: right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant or his counsel shall have the right to make the last argument.

A P P E N D I X - B

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR ____ RICHLAND ____ COUNTY,

SOUTH CAROLINA*

The State v. Joseph Carl Shaw

Docket No. 77-GS-40-2942

A. Data Concerning the Defendant**

1. Name Shaw (Last) Joseph (First) Carl (Middle) 2. Date of Birth 3 31 55 (Mo. Day Yr.)

3. Social Security Number [ ] 407 86 3041 [ ] Unknown

4. Sex: M [X] F [ ]

5. Race: W [X] B [ ] Other (Specify): _____

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 (9) 10 11 12 13 14 15 16
(Circle One) (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes [X] No [ ]

If so, is it

a. Below Average [X]
b. Average [ ]
c. Above Average [ ]

8. Was a psychiatric evaluation performed? Yes [X] No [ ]

a. If performed,*** by whom? Jack C. Dunlap, M. D. Harold C. Morgan, M. D.
b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes [X] No [ ]
(2) Able to cooperate intelligently in his own defense? [X] [ ]
c. If performed, were character or behavior disorders found? [X] [ ]
(If answer is yes please elaborate)

LATENT SCHIZOPHRENIC

POSSIBLE TOXIC PSYCHOSIS (ALCOHOL AND DRUG ABUSE)
(see below)

*Attach separate sheets where insufficient space provided for response.
**Separate report must be submitted for each defendant sentenced to death.
***If more than one evaluation was performed, attach a separate response for each evaluation.

Emotional disturbance of psychiatric pathological proportions which influenced commission of offenses and directly or indirectly affected the capacity to appreciate the criminality of conduct.

9. Does the defendant have a record of prior convictions?

Yes [ ] No [X]

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

Offense	Date of Offense	Sentence Imposed
1.		
2.		
3.		
4.		
5.		
6.		

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [ ] Nonresident [X] Stationed at Fort Jackson, Columbia, S.C.

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on November 2 ____, 1977.

2. Was a preliminary hearing requested? Yes [X] No [ ]

3. Was a preliminary hearing conducted? Yes [X] No [ ]

4. The defendant was indicted at the November 29, 1977 Term of the Court of General Sessions for Richland County, South Carolina.

5. List each charge alleged in the indictment.

a. Conspiracy

b. Conspiracy

c. Murder

d. Murder

e. Rape

f. Criminal Sexual Conduct

g. Armed Robbery

6. The defendant was arraigned on December 5 ____, 1977.

a. If not arraigned, did the defendant waive arraignment?

Yes [ ] No [ ]

7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

Yes [X] No [ ]

a. If not, did the defendant waive this right to a three-day sight of the indictment?

Yes [ ] No [ ]

8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?

Yes [X] No [ ]

9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes [X] No [ ] There was dispute as to the sufficiency of the notice.

10. Did the defendant move for a change of venue?

Yes [ ] No [X]

a. If so, was the venue changed? N/A

Yes [ ] No [ ]

(1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Richland County, South Carolina, on December 12 __, 19 77, during the December, 19 77 Term of that Court.

2. How did the defendant plead? Guilty [X]
Not Guilty [ ]

3. List each offense of which the defendant was adjudicated guilty and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Conspiracy

(2) Conspiracy

(3) Murder (6) Criminal Sexual Conduct

(4) Murder (7) Armed Robbery

(5) Rape

b. The offense(s) of which the defendant was acquitted:

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

On what date and at what time did the adjudications occur?

December 12 _____, 19 77, at

4:30 o'clock, p .m.

D. Data Relating to Sentencing Proceeding*

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury [ ] the trial judge [X]
a new jury [ ] a new trial judge [ ]

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

_____ _____, 19____, at

_____o'clock, _____.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes [ ] No [ ]

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [ ] No [ ]

(b) On what date and at what time was the sentencing proceeding held?

_____ _____, 19 _____, at

_____o'clock, _____.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

December 14, 15 and 16, 19 77.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held?

_____ _____, 19_____.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes [ ] No [ ]

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	Instructed	Found
a. Murder was committed while in the commission of		
(1) Rape	[ ]	[X]
(2) Assault with intent to ravish	[ ]	[ ]
(3) Kidnapping	[ ]	[X]
(4) Burglary	[ ]	[ ]
(5) Robbery while armed with a deadly weapon	[ ]	[X]
(6) Larceny with use of a deadly weapon	[ ]	[ ]
(7) Housebreaking	[ ]	[ ]
(8) Killing by poison	[ ]	[ ]

	Instructed	Found
b. Murder was committed by a person with a prior record of conviction for murder.	[ ]	[ ]
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person	[ ]	[ ]
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

   Yes [X] No [ ]

4. Was there evidence of mitigating circumstances?

   Yes [X] No [ ]

5. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. [X]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [X]

   c. The victim was a participant in the defendant's conduct or consented to the act. [ ]

   d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. [ ]

   e. The defendant acted under duress or under the domination of another person. [ ]

   f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. [X]

   g. The age or mentality of the defendant at the time of the crime(s). [X]

   h. The defendant was provoked by the victim into committing murder. [ ]

i. The defendant was below the age of eighteen at the time of the crime(s). [ ]

j. Other. [ ]

Please explain if (j) is checked.

_____

_____

_____

5. If tried with a jury, was the jury instructed to consider the circumstances in j as mitigating circumstances?

Yes [ ] No [ ]

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes [ ] No [ ]

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes [X] No [ ]

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes [X] No [ ]

b. Under the influence of narcotics or other dangerous drugs? Yes [X] No [ ]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [X] No [ ]

a. If so, check each weapon used

(1) Poison [ ]
(2) Pistol [ ]
(3) Rifle [X]
(4) Shotgun [ ]
(5) Blunt instrument (Describe)

_____ [ ]

(6) Sharp instrument (Describe)

_____ [ ]

(7) Motor vehicle [ ]
(8) Other (Describe)

_____ [ ]

3. Cause of death. gunshot

_____

4. County in which the body was found. Richland

5. County in which the murder occurred if different from county in which the body was found. Richland

F. Data Relating to Victim

1. What was the victim's age? 14 and 17

2. Was the victim related by blood or marriage to the defendant?

Yes [ ] No [X]

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes [X] No [ ]

4. Was the victim the same sex as the defendant? Yes [ ] No [ ] One Male One Female

5. Was the victim physically harmed or tortured? Yes [X] No [ ] (One victim raped)

If yes, state nature of harm or extent of torture:

One victim was raped.

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

	Name	Mailing Address
a.	Kermit S. King	1426 Richland Street, Columbia, S.C. 29201
b.	Dallas D. Ball	1412 Barnwell Street, Columbia, S.C. 29201
c.	W. Thomas Vernon	P. O. Box 11716, Columbia, S.C. 29211
d.		

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant [ ]
Appointed by court [X]

a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	Name	Date retained or appointed	Years experience as attorney	Years felony trial experience
(1)	Kermit S. King	11-4-77	19	19
(2)	Dallas D. Ball	11-4-77	13	13
(3)	W. Thomas Vernon	11-4-77	2	2
(4)				

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

N/A

4. Did each counsel serve throughout the trial? Yes [X] No [ ]

a. If not, explain in detail. _____

H. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. Were members of the defendant's race represented on the petit jury? Yes [ ] No [ ] N/A

4. Were members of the defendant's race represented on the jury venire? Yes [ ] No [ ] N/A

5. Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes [ ] No [ ] N/A

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [ ] N/A

7. Was there extensive publicity in the community concerning this case? Yes [X] No [ ]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [ ] N/A

9. Was the jury sequestered? Yes [ ] No [ ] N/A

10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes [ ] No [ ] N/A

11. Your general comments concerning the appropriateness of the sentence imposed in this case.

It is the Court's belief that the death sentence is justified under the circumstances of this case.

12. If the defendant is a female, is she currently pregnant? Yes [ ] No [ ]

a. If so, the anticipated delivery date is _____ _____, 19___.

13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and

a. His (their) comments are attached [X]
b. He (they) stated he (they) had no comments [ ]
c. He has (they have) not responded [ ]

Defendant's counsels find the report factually accurate (and supplied most of the information where not already known from the record in this case).

THE STATE v. SHAW, ET AL.

I. Chronology of Case

			Elapsed Days
1.	Date of offense	October 29, 1977	
2.	Date of arrest	November 3, 1977	5
3.	Date trial began	December 12, 1977	44
4.	Date sentence imposed	December 16, 1977	48
5.	Date post trial motions ruled on		
6.	Date trial judge's report completed		
7.	*Date received by Supreme Court	July 19, 1978	
8.	*Date sentence review completed	May 28, 1979	
9.	*Total elapsed days	From date of Offense to Date of Opinion	576

*To be completed by Supreme Court

s/ David W. Harwell
Judge, Court of General Sessions

Richland County,
South Carolina

December 16th, 1977
Date

A P P E N D I X - C

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR Richland COUNTY,

SOUTH CAROLINA*

The State v. James Terry Roach

Docket No. 77-GS-40-2942

A. Data Concerning the Defendant**

1. Name Roach (Last) James (First) Terry (Middle) 2. Date of Birth 2 (Mo.) 19 (Day) 60 (Yr.)

3. Social Security Number [ ] 252 25 4269 [ ] Unknown

4. Sex: M [X] F [ ]

5. Race: W [X] B [ ] Other (Specify): _____

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 (9) 10 11 12 (Circle One) 13 14 15 16 (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes [X] No [ ]

If so, is it

a. Below Average [X]
b. Average [ ]
c. Above Average [ ]

8. Was a psychiatric evaluation performed? Yes [X] No [ ]

a. If performed,*** by whom? Dr. Edmond Camp, III Dr. Wayne Lockhart

b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes [X] No [ ]
(2) Able to cooperate intelligently in his own defense? [X] [ ]

c. If performed, were character or behavior disorders found? [X] [ ]
(If answer is yes please elaborate)

1. Mental Retardation

2. Antisocial Personality Disorder

*Attach separate sheets where insufficient space provided for response.
**Separate report must be submitted for each defendant sentenced to death.
***If more than one evaluation was performed, attach a separate response for each evaluation.

The defendant and others testified that he had hallucinations as result of alcohol and drug use.

9. Does the defendant have a record of prior convictions?

Yes [X] No [ ]

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

Offense	Date of Offense	Sentence Imposed
1. Juvenile record only		
2.		
3.		
4.		
5.		
6.		

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [ ] Nonresident [X]

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on November 3 ___, 1977.

2. Was a preliminary hearing requested? Yes [X] No [ ]

3. Was a preliminary hearing conducted? Yes [X] No [ ]

4. The defendant was indicted at the November 29, 19 77 Term of the Court of General Sessions for Richland County, South Carolina.

5. List each charge alleged in the indictment.

   a. Conspiracy

   b. Conspiracy

   c. Murder

   d. Murder

   e. Rape

   f. Criminal Sexual Conduct

   g. Armed Robbery

6. The defendant was arraigned on December 5 ____, 19 77.

   a. If not arraigned, did the defendant waive arraignment?

   Yes [ ] No [ ]

7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

   Yes [X] No [ ]

   a. If not, did the defendant waive this right to a three-day sight of the indictment?

   Yes [ ] No [ ]

8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?

   Yes [X] No [ ]

9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

   Yes [X] No [ ] But there was dispute as to the sufficiency of the notice.

10. Did the defendant move for a change of venue?

    Yes [ ] No [X]

    a. If so, was the venue changed?

    Yes [ ] No [ ]

    (1) If so, designate the county_____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Richland County, South Carolina, on December 13 ____, 19 77, during the December, 19 77 Term of that Court.

2. How did the defendant plead? Guilty [X]
Not Guilty [ ]

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted?

a. The offense(s) of which the defendant was convicted:

(1) Conspiracy-Nolo Contendre

(2) Conspiracy-Nolo Contendre

(3) Murder

(4) Murder

(5) Rape

(6) Criminal Sexual Conduct

(7) Armed Robbery

b. The offense(s) of which the defendant was acquitted:

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

4. On what date and at what time did the conviction(s) occur?

December 13 _____, 19 77, at

10:30 o'clock, a .m.

D. Data Relating to Sentencing Proceeding"

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury [ ] the trial judge [X]
a new jury [ ] a new trial judge [ ]

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

_____ _____, 19_____, at

_____o'clock, _____.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes [ ] No [ ]

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [ ] No [ ]

(b) On what date and at what time was the sentencing proceeding held?

_____ _____, 19____, at

_____o'clock, _____.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [X] No [ ]

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

December 14, 15 and 16, 19 77.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held?

_____ _____, 19_____.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes [ ] No [ ]

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	Instructed	Found
a. Murder was committed while in the commission of		
(1) Rape	[ ]	[X]
(2) Assault with intent to ravish	[ ]	[ ]
(3) Kidnapping	[ ]	[X]
(4) Burglary	[ ]	[ ]
(5) Robbery while armed with a deadly weapon	[ ]	[X]
(6) Larceny with use of a deadly weapon	[ ]	[ ]
(7) Housebreaking	[ ]	[ ]
(8) Killing by poison	[ ]	[ ]
b. Murder was committed by a person with a prior record of conviction for murder.	[ ]	[ ]

	Instructed	Found
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

   Yes [X] No [ ]

4. Was there evidence of mitigating circumstances?

   Yes [X] No [ ]

5. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. [X]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [X]

   c. The victim was a participant in the defendant's conduct or consented to the act. [ ]

   d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. [ ]

   e. The defendant acted under duress or under the domination of another person. [X]

   f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. [X]

   g. The age or mentality of the defendant at the time of the crime(s). [X]

   h. The defendant was provoked by the victim into committing murder. [ ]

   i. The defendant was below the age of eighteen at the time of the crime(s). [X]

Yes [ ] No [ ]

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes [X] No [ ]

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

   a. Under the influence of alcohol? Yes [X] No [ ]

   b. Under the influence of narcotics or other dangerous drugs? Yes [X] No [ ]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

   Yes [X] No [ ]

   a. If so, check each weapon used

   (1) Poison [ ]
   (2) Pistol [ ]
   (3) Rifle [X]
   (4) Shotgun [ ]
   (5) Blunt instrument (Describe) _____ [ ]
   (6) Sharp instrument (Describe) _____ [ ]
   (7) Motor vehicle [ ]
   (8) Other (Describe) _____ [ ]

3. Cause of death. Gunshot

4. County in which the body was found. Richland

5. County in which the murder occurred if different from county in which the body was found. Richland

F. Data Relating to Victim

1. What was the victim's age? 14 and 17

2. Was the victim related by blood or marriage to the defendant?

Yes [ ] No [X]

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes [X] No [ ]

4. Was the victim the same sex as the defendant? Yes [ ] No [ ] One Male One Female

5. Was the victim physically harmed or tortured? Yes [X] No [ ]

If yes, state nature of harm or extent of torture:

Female was raped.

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

	Name	Mailing Address
a.	Walter W. Brooks	2126 Devine St. Suite 101, Columbia, S.C. 29205
b.	Barry B. George	1419 Bull Street, Columbia, S.C. 29201
c.	John A. Mason	P. O. Box 1017, Columbia, S.C. 29202
d.		

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant [ ]
Appointed by court [X]

a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	Name	Date retained or appointed	Years experience as attorney	Years felony trial experience
(1)	Barry B. George	11-4-77	7	7
(2)	Walter W. Brooks	11-4-77	12	12
(3)	John A. Mason	11-4-77	26	26
(4)				

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

None

4. Did each counsel serve throughout the trial?

Yes [X] No [ ]

a. If not, explain in detail. _____

_____

H. General Considerations

1. Was race raised by the defense as an issue in the trial?
Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial?
Yes [ ] No [X]

3. Were members of the defendant's race represented on the petit jury?
Yes [ ] No [ ] N/A

4. Were members of the defendant's race represented on the jury venire?
Yes [ ] No [ ] N/A

5. Was there any evidence that members of the defendant's race were systematically excluded from the jury?
Yes [ ] No [ ] N/A

6. Was the jury instructed to exclude race as an issue?
Yes [ ] No [ ] N/A

7. Was there extensive publicity in the community concerning this case?
Yes [X] No [ ]

8. Was the jury instructed to disregard such publicity?
Yes [ ] No [ ] N/A

9. Was the jury sequestered?
Yes [ ] No [ ] N/A

10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence?
Yes [ ] No [ ] N/A

11. Your general comments concerning the appropriateness of the sentence imposed in this case.

It is the Court's belief that the death sentence is justified under the circumstances of this case.

12. If the defendant is a female, is she currently pregnant?
Yes [ ] No [ ]

a. If so, the anticipated delivery date is

_____ _____ _____, 19___.

13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and

a. His (their) comments are attached [X]
b. He (they) stated he (they) had no comments [ ]
c. He has (they have) not responded [ ]

Defendant's counsels find the report factually accurate and supplied most of the information where not already known from the record in this case.

THE STATE v. SHAW, ET AL.

I. Chronology of Case

			Elapsed Days
1.	Date of offense	October 29, 1977	
2.	Date of arrest	November 3, 1977	5
3.	Date trial began	December 12, 1977	44
4.	Date sentence imposed	December 16, 1977	48
5.	Date post trial motions ruled on		
6.	Date trial judge's report completed		
7.	*Date received by Supreme Court	July 19, 1978	
8.	*Date sentence review completed	May 28, 1979	576
9.	*Total elapsed days	From Date of Offense to Date of Opinion	

*To be completed by Supreme Court

s/ David W. Harwell
Judge, Court of General Sessions

Richland County,
South Carolina

December 16, 1977
Date

j. Other. [ ]

Please explain if (j) is checked.

_____

_____

_____

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances?

Yes [ ] No [ ]

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

JAMES TERRY ROACH, Petitioner, -vs- WARDEN JOSEPH MARTIN, Central Corrections Institution, Columbia, South Carolina, and DANIEL R. MCLEOD, Attorney General for South Carolina, Respondents.	)	CASE NO. 81-1907-1 ORDER

On application by Petitioner for a stay of execution of the sentence of death imposed upon Petitioner by the Fifth Judicial Circuit of South Carolina for the County of Richland on December 16, 1977, scheduled to be carried out on September 18, 1981.

I find that this Court has jurisdiction in this case in view of the filing by Petitioner of a "Petition for Writ of Habeas Corpus by a Person in State Custody" asserting that his conviction and sentence of death violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States; and that those contentions are within the jurisdiction conferred upon this Court by 28 U.S.C. §2241(c)(3).

I find that the authority of this Court to stay Petitioner's execution is expressly conferred by 28 U.S.C. §2251, and that stays of execution have regularly been granted by federal courts to death sentenced prisoners pending disposition of their federal constitutional claims. Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980); Whitney v. Wainwright, 339 F.2d 275, 276 (5th Cir. 1964); Clark v. Grimes, 374 F.2d 550, 553 (5th Cir. 1967).

EXHIBIT "F"

I find that the Chief Justice of the United States Supreme Court has within the past two weeks granted a stay of execution to a death sentenced South Carolina prisoner upon a similar showing.

IT IS HEREBY ORDERED, that the application of Petitioner, James Terry Roach, for a stay of his execution now set for Friday, September 18, 1981, is granted and the execution is stayed pending further orders of this court to enable Petitioner to pursue with all expedition such federal remedies as remain available.

IT IS FURTHER ORDERED, that the Clerk shall give immediate telephonic or telegraphic notice to William Leake, Commissioner of the South Carolina Department of Corrections; to Warden Joseph Martin, Central Corrections Institution, 1515 Gist Street, Columbia, South Carolina; to Daniel McLeod, Attorney General for South Carolina; and to Richard W. Riley, Governor of South Carolina, and Nancy Stevenson, Lt. Governor of South Carolina, that the Petitioner's execution is stayed by order of this court, and that a certified copy of this order shall be subsequently served upon these persons by the United States Marshal.

Falcon B. Hawkins

FALCON B. HAWKINS
United States District Judge

At Charleston, South Carolina,
this 4th day of September, 1981.

TRUE COPY
Test:
JOHN W. WILLIAMS, CLERK
By: Deputy Clerk

Opposition

WLE KJP

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT, U.S.

No. 81-5628

ORIGINAL COPY

JAMES TERRY ROACH, Petitioner

versus

THE STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT A
COPY OF Brief in Opposition
HAS BEEN SERVED UPON OPPOSING COUNSEL BY
MAILING 1 COPIES IN AN ENVELOPE PROPERLY
ADDRESSED WITH POSTAGE PREPAID THIS 18th
DAY OF December, 1981.

ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 18th DAY
OF December, 1981
Karen Y. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-88

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

JAMES TERRY ROACH, Petitioner

versus

THE STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of South Carolina, not yet reported, appears as Appendix A appended to the Petition for a Writ of Certiorari at page 34.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Whether the imposition of the death penalty upon the Petitioner is constitutionally disproportionate in violation of the Eighth and Fourteenth Amendments of the United States Constitution?

II.

Whether the South Carolina death penalty statute violates the due process and equal protection clauses of the United States Constitution?

ARGUMENT

The State of South Carolina, in opposition to the Petition for a Writ of Certiorari in this matter respectfully submits the following:

Petitioner's sentence to death is entirely proportionate to the heinous crimes for which he stands convicted.

Petitioner contends this Court should grant certiorari to determine whether or not his death sentence is proportionate to the heinous crimes for which he stands convicted. Respondent respectfully submits that Appellant's contentions that evidence was insufficient to support the trial court's conclusion that Petitioner was a trigger man were thoroughly presented to the South Carolina Supreme Court on direct appeal and resolved contrary to Petitioner's present contention. Petition for a Writ of Certiorari from that decision was denied by this Court on January 7, 1980. This Court also denied rehearing. Hence, Respondent respectfully submits that these issues are improperly before this Court on this Petition for Writ of Certiorari from State post conviction relief proceedings. Furthermore, all other issues regarding Petitioner's responsibility for his crimes presented in the State post conviction proceeding were fully

considered and resolved contrary to Petitioner's position by the South Carolina Supreme Court. Respondent's brief in that matter is attached hereto as Exhibit A, and incorporated herein by reference.

Respondent respectfully submits that Petitioner presents no issues to this Court which have not been factually resolved by the South Carolina Supreme Court. As a matter of constitutional law, Respondent recognizes that this Court has since granted certiorari in two cases which present constitutional questions regarding the execution of an individual under eighteen years of age. Eddings v. Oklahoma, cert. granted 88 L. Ed. 237 (1981); Enmond v. Florida, cert. granted ___ U.S.L.W. ___ (October 19, 1981).

II.

The South Carolina death penalty statute does not violate the due process and equal protection clauses of the United States Constitution.

This issue was fully briefed and disposed of by the South Carolina Supreme Court. Respondent's brief on this issue is attached hereto as Exhibit A, and incorporated herein by reference.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

EXHIBIT A

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QUESTIONS PRESENTED

I.

Whether the record contains ample evidence which supports the lower court's finding that the Appellant was adequately and effectively represented by trial counsel? (Appellant's Question I)

II.

Whether the lower court properly found that the Appellant was adequately represented at the sentencing stage of the proceedings? (Appellant's Question II)

III.

Whether the lower court properly found the guilty pleas were freely and voluntarily entered in that the Appellant possessed sufficient capacity to enter his guilty plea and the record of the plea is constitutionally adequate? (Appellant's Question III)

IV.

Whether James Terry Roach, having knowingly and intelligently waived his rights to a jury trial, can be constitutionally sentenced to death without a jury determination of his sentence? (Appellant's Questions IV and V)

V.

Whether the lower court was absolutely correct in holding that Appellant had utterly failed to demonstrate that the South Carolina Death Penalty Statute has been disproportionately requested and imposed against individuals who are accused and convicted of taking the lives of white victims? (Appellant's Question VI)

VI.

Whether the lower court correctly determined that Appellant is presently sane? (Appellant's Question VII)

VII.

Whether the lower court did not err in failing to hold that the admission of the testimony of Dr. Edmund W. Camp, III, denied the Appellant a fair trial? (Appellant's Question VIII)

VIII.

Whether Appellant's sentence of death received meaningful proportionality review by this Court? (Appellant's Question IX)

IX.

Whether the lower court properly refused to disturb or set aside the death penalty affirmed by the decision of this Court in State v. Shaw, et al.? (Appellant's Question X)

X.

Whether the lower court properly refused to hold that the imposition of the death penalty upon the Appellant is disproportionate? (Appellant's Question XI)

XI.

Whether the imposition of the death penalty upon Appellant has already been found by this Court to be constitutionally proportionate? (Appellant's Question XII)

XII.

Whether the lower court properly held that the Appellant had not met his burden of showing by a preponderance of the evidence that there are any meritorious grounds for relief? (Appellant's Question XIII)

STATEMENT

The Appellant, James Terry Roach, is presently confined in the Central Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County, South Carolina. James Terry Roach was arrested on November 3, 1977, and charged with armed robbery, kidnapping, criminal sexual conduct, two counts of murder, and two counts of conspiracy arising out of the October 29, 1977, slaying of Thomas Taylor and Carlotta Hartness. Prior to the indictment of the Appellant, the Honorable John Grimball, Resident Judge of the Fifth Judicial Circuit, appointed Walter W. Brooks, Esquire, and Barry B. George, Esquire, to represent the Appellant. Judge Grimball appointed John A. Mason, Esquire, to serve as back-up counsel for the Appellant. The Appellant was indicted at the November 1977 term of the Court of General Sessions for Richland County for the offenses of armed robbery, kidnapping, criminal sexual conduct, two (2) counts of conspiracy and two (2) counts of murder.

The Solicitor served Notices upon the Appellant that the State intended to seek the death penalty in the two (2) murder counts. Subsequently, the Solicitor serviced Notices, dated December 9, 1977, upon the Appellant of the aggravating circumstances which the State would seek to prove during the sentencing portion of the bifurcated trial, provided for by

the current South Carolina Death Penalty Act. (South Carolina Sections 16-3-20 through 16-3-28, 1976 Code of Laws, Cum. Supp. 1978).

On December 12, 1977, the case against the Appellant was called to trial before the Honorable David W. Harwell, Presiding Judge of the Fifth Judicial Circuit.

On December 13, 1977, the Appellant appeared before Judge Harwell and entered pleas of guilty to armed robbery, kidnapping, criminal sexual conduct and two (2) counts of murder, and entered a plea of nolo contendre to two (2) counts of conspiracy. Judge Harwell, sitting without a jury, commenced the sentencing proceeding as required by law. Section 16-3-20(B), South Carolina Code of Laws, Cum. Supp. (1978). Following that hearing, Judge Harwell imposed the death penalty upon the Appellant on December 16, 1977.

The Appellant filed a timely appeal to the Supreme Court of South Carolina. Prior to the docketing of the appeal, on or about July 7, 1978, the family of the Appellant retained John K. Grisso, Esquire, and O. Grady Query, Esquire. The sentence was subject to automatic review by the South Carolina Supreme Court pursuant to Section 16-3-25(A), South Carolina Code of Laws, Cum. Supp. (1978).

On May 28, 1979, the South Carolina Surpeme Court, in a full written opinion, affirmed the Appellant's convictions and the trial judge's imposition of the death penalty. State v. Shaw, et al., 273 S.C. 194, 255 S.E.2d 799 (1979). The Supreme Court upheld the South Carolina Death Penalty

Act and dismissed the appeal. The Appellant then filed a Petition for a Writ of Certiorari in the United States Supreme Court. The Petition was denied by the United States Supreme Court on January 7, 1980.

By Order of the Clerk of Court of the South Carolina Supreme Court dated January 17, 1980, the execution of the Appellant was set for February 8, 1980. This Order was pursuant to Order of the South Carolina Supreme Court to the Clerk to send the remittitur and proceed with execution.

Following the Appellant's filing for post conviction relief, the Honorable J. Woodrow Lewis, Chief Justice, South Carolina Supreme Court, issued an Order dated February 5, 1980, which granted a stay of execution so that the Appellant's post conviction relief application would be heard as promptly as possible.

In his Application for Post Conviction Relief, the Appellant set out a total of thirty-nine (39) allegations. The matter was convened for an evidentiary hearing on April 7, 1980, before the Honorable Clyde A. Eltzroth, Presiding Judge. On July 8, 1980, Judge Eltzroth filed an Order denying his Application for Post Conviction Relief on each and every ground. Appellant filed a timely notice to appeal. This appeal follows.

ARGUMENT

I.

The record contains ample evidence which supports the lower court's finding that the Appellant was adequately and effectively represented by trial counsel. (Appellant's Question I)

The first question addressed here is whether the lower court properly concluded that the Appellant was adequately and effectively represented by trial counsel. The inquiry is, on this appeal, however, a narrow one and confines itself to the following question: Does the record contain any evidence upon which the lower court could have based its ruling? McCall v. State, 258 S.C. 463, 189 S.E.2d. 6 (1972). Respondents submit that the answer is, quite simply, "yes."

The specific findings of fact are set out at some length in the order of the lower court. See, Addendum to Transcript of Record, 1-16. The specific findings will be addressed at appropriate times throughout this argument and need not be presently restated here in their entirety. However, by way of generalization, it is sufficient to say that the lower court found that the Appellant was adequately and effectively represented by trial counsel "within the range of competency demanded. McMann v. Richardson, 397 U.S. 759 (1970); Marzullo v. Maryland, supra." Addendum at 16.

The Appellant claims otherwise and has raised several specific claims of ineffective representation by his trial counsel. The Appellant's claims are conclusively refuted by the record, but they are, nevertheless, addressed below. Prior to that discussion, it may be helpful to have the issue of counsels' representation placed in the proper context.

The Applicant and two others, Joseph Carl Shaw, and Ronnie Mahaffey, were charged with two counts of murder, armed robbery, kidnapping, criminal sexual conduct, first degree, and criminal conspiracy, as a result of their having brutally murdered two Columbia teenagers in the latter part of October, 1977. Appellant and Mahaffey were the first arrested and both gave complete confessions to the police. Both inculpated J. C. Shaw who was subsequently arrested and charged.

Local counsel were appointed for all defendants. Kermit King, Esquire, Dallas D. Ball, Esquire, and Thomas Vernon, Esquire, were appointed to represent Shaw. The Richland County Public Defender and Dwight Drake, Esquire, were appointed to represent Mahaffey. Walter W. Brooks, Barry George, Esquire, and John A. Mason, Esquire, were appointed to represent the Appellant. The attorneys appointed were experienced, able trial attorneys who were generally recognized for their expertise in the

handling of major criminal cases. Walter Brooks had been practicing law for twelve years and had substantial criminal defense experience; Barry George had been practicing criminal law for seven years and he, too, had substantial criminal trial experience; John A. Mason had been practicing law for approximately twenty-four years, both as a trial lawyer and as a judge of the county court. The group of lawyers appointed not only had substantial criminal defense experience, they had, between them, an intimate familiarity with the local conditions, including potential persons who may have been called for jury duty. The record of the post conviction hearing demonstrates in detail the breadth and width of the experience, knowledge and ability of the trial counsel who represented the Appellant. The record here also details with particularity the scope of counsels' efforts on behalf of the Appellant. With the foregoing in mind, Respondents proceed to address the specific allegations made by the Appellant.

A.

The record supports a finding that trial counsel conducted adequate factual investigation.

After having reviewed the entire record, the lower court found that trial counsel had conducted the necessary factual investigation into the case. The lower court specifically found as follows:

> I find that counsel conducted an adequate and exhaustive investigation into the facts of the case. Springer v. Collins [cite omitted]; Coles v. Peyton [cite omitted]. Addendum, p.4.

An examination of the record reveals that the finding of the lower court is fully and amply supported by the testimony.

For example, the testimony of Walter W. Brooks is illustrative of the factual investigation made by trial counsel. Specifically, Mr. Brooks related that they (trial counsel) first talked with the Appellant at the county jail and determined that he had made a statement to the police. (T.R. 973, l.3-974, l.22). Mr. Brooks testified that they went over the statement with the Appellant "word for word" (T.R. 977, l.11) in an effort to determine what had happened. Mr. Brooks testified that Appellant told them that he had voluntarily given a statement to Officer Cronise after he had been advised of his rights because he wanted to "get it off his conscience." (T.R. 973, ll.7-24). Mr. Brooks related that trial counsel had talked with the police officers (T.R. 978, l.17-979, l.18). Mr. Brooks further stated that he had discussed the case with Lt. Walter Powell of the State Law Enforcement Division (SLED) on at least five occasions (T.R. 984, ll.18-20) and had obtained various

records from SLED, including a ballistics report run on the murder weapon. (T.R. 984, 11.5-15). Counsel also spent time talking with Deputy Solicitor John McIntosh about plea negotiations which were summarily rejected by the Solicitor's Office. (T.R. 985, 1.17-986, 1.11; see also, testimony of Solicitor James C. Anders, T.R. 1278, 11.7-11; T.R. 1292, 1.21-1294, 1.16). Mr. Brooks testified that the Solicitor and his investigator, Mr. Culclasure, had an open door policy and at one time allowed trial counsel the opportunity to view the stack of photographs of the murder scene. (T.R. 987, 1.20-988, 1.25).

Trial counsel were aware that the codefendant Mahaffey had given a statement and had blamed the Appellant and J. C. Shaw of having fired the fatal shots. (T.R. 989, 1.1-991, 1.16; see also, Respondents' exhibit 3). Trial counsel also were aware that Appellant had been sent to the South Carolina State Hospital for evaluation and the result of those findings, i.e., that the Appellant was competent to stand trial and was not suffering from a mental illness. (T.R. 991, 1.17-992, 1.5). Counsel also obtained the services of a Columbia psychiatrist, Dr. Wayne Lockhart, who examined the Appellant at counsel's request, and were aware of Lockhart's findings, which were consistent with those of the State Hospital. (T.R. 992, 1.6-993, 1.8). Mr. Brooks testified that he conferred with the Appellant at least twelve times at the jail in addition to the times at

the various hearings. (T.R. 993, 11.9-21). Counsel discussed the case with the Appellant's parents. (T.R. 993, 1.22-994, 1.22). Trial counsel filed motions to discover any information exculpatory to the Appellant (T.R. 994, 1.23-995, 1.3), and had no problem obtaining information relative to the facts of the case. (T.R. 996, 11.3-8). As a result of the pre-trial discovery and investigation, trial counsel were able to determine that the State had a "devastating case," as far as ability to convict. (T.R. 996, 11.13-14). Trial counsel further testified that they were, nevertheless, ready to go to trial and had obtained a list of the jury venire and additional information about the jury venire. Lastly, trial counsel testified that they had learned that Appellant had, in fact, committed the acts attributed to him by Mahaffey. (T.R. 980, 11.1-15). Although, the above references to the record are derived generally from the testimony of Walter Brooks, the substance of Brooks' testimony was fully corroborated, and in some instances supplemented, by both Mr. George and Mr. Mason.

Trial counsels' factual investigation in this matter is alleged to have been ineffective for reasons set out in Appellant's brief. (See Appellant's brief, 51). However, the record does not support the Appellant's claims.

There was no necessity that counsel have interviewed Officer Cronise. In the first place, Appellant stated to his attorneys that he had voluntarily talked to Cronise on the way back from Saluda after he had been advised of his constitutiional rights. (T.R. 973, 11.8-24). Secondly, the Appellant's statement was exculpatory as to whether Appellant had actually pulled the trigger as to either of the victims. (T.R. 974, 11.11-19; see also, Respondents' Exhibit No. 1). Thirdly, the lower court, relying on Miranda v. Arizona, 396 U.S. 868 and Michigan v. Moseley, 423 U.S. 96, and after having heard the testimony of Officer Cronise and others at the post conviction hearing determined, beyond a reasonable doubt, that the Appellant's original statement to Officer Cronise was free and voluntary after the Appellant had been properly advised of his rights. (Addendum, p.5). Thus, under the holding of Sallie v. North Carolina, 587 F.2d. 636 (4th Cir.1978), trial counsel were not ineffective in not having moved to suppress the statement.

Furthermore, the lower court specifically found that the Appellant would have been convicted without the use of his confession. (Addendum, p.4). The lower court also found that trial counsels' failure to move to suppress the Appellant's confession was not the result of ignorance, mistake, ineffectiveness or inadequacy but was the result of an informed decision. (Addendum, pp.4-5).

Present counsel's argument that the confession could have been suppressed and then used by the Appellant (Appellant's brief, 43 and 51) is wholly unpersuasive. Trial counsel learned prior to the guilty pleas that the Appellant, in fact, killed Tommy Taylor and fired the first shots into Carlotta Hartness (T.R. 980, 11.1-15; T.R. 1005, 11.7-15; T.R. 1009, 1.15-1010, 1.7; T.R. 1314, 1.15-1315, 1.21; T.R. 1317, 11.5-19; T.R. 1413, 1.8-1414, 1.17). Armed with the knowledge that the Appellant's version as contained in the confession was untrue, trial counsel could not have ethically made affirmative use of the statement without having perpetrated a fraud upon the court. Thus, the Appellant's argument that counsel should have moved to suppress the confession and then used it affirmatively in their defense of the Appellant demonstrates a misunderstanding of an attorney's ethical obligations to the court.

Nor were trial counsel ineffective in not having called Mr. Carter (one of the State's potential witnesses). However, as the record of the sentencing proceeding demonstrates, Carter was not called as a State's witness because Richard LaRoque's (See, T.R. Guilty Plea, 181-220) testimony was so incredible after he was cross-examined by Mr. King that the Solicitor obviously did not want to put up another witness whose credibility was so questionable. The question becomes why would defense counsel want to call an incredible witness

such as a LaRoque or Carter. The answer is simply they would not. Secondly, there is no support in the record for Appellant's claim that Carter's testimony would have been exculpatory as to the Appellant. Carter did not testify at the original sentencing proceeding, and he did not testify at the post conviction hearing.

Trial counsel were not ineffective in not having further investigated whether Appellant suffered from Huntington's Chorea. The testimony at the post conviction hearing essentially confirmed the sentencing testimony of Dr. Edmond W. Camp, III, that the Appellant cannot be diagnosed as presently suffering from Huntington's Chorea. See, generally, testimony of Dr. Charles M. Still. (T.R. 1199, l.13-1273, l.3). The conclusion of Dr. Still's court-ordered examination of the Appellant is set out in the record. (T.R. 1210, ll.14-19; T.R. 1252, ll.2-5). And according to Dr. Still, there still exists no reliable presymptomatic detection test, and no diagnosis of Huntington's Chorea can be made until the three symptoms characteristic of the disease manifest themselves. (T.R. 1256, l.17-1257, l.13). The fact that the Appellant is not presently diagnosed as suffering from Huntington's Chorea, in conjunction with the findings of the State Hospital, Dr. Wayne Lockhart, and Dr. Harold Morgan (T.R. 785-824), confirmed that the Appellant would have had no defense based upon the mere possibility that he may some day manifest symptoms of Huntington's Chorea.

The Appellant has also alleged that trial counsel should have conducted a more thorough investigation into a possible drug-induced psychosis as a defense. The Appellant's argument depends largely upon his claim that he was involutarily under the influence of phencylcodine (PCP). The claim is spurious.

First, the record does not disclose that the Appellant was, in fact, under the influence of PCP. The reason for the lack of evidence is simple; there exists no way now, and there existed no way in October, 1977, to determine the actual substance used by the Appellant. (T.R. 1475, 11.17-25). A pharmacologist could not have testified as to the actual drug injested based merely upon a description of the drug. (T.R. 18-22). Thomas Medders (Doc) could not have testified as to what the drug was unless he had run generally accepted scientific tests on the samples of the specific drug injested by Appellant, so there was no need to contact him. Respondents submit that, had Doc run the accepted scientific tests on the samples of drugs ingested by the Appellant, he would have been called by Appellant at the post conviction hearing. As noted by the lower court, the testimony of Dr. Milne to the effect that the drug injested was probably PCP (T.R. 32-100), was, "at best, speculative." (Addendum, p.10).

Secondly, the Appellant and Mahaffey, both of whom supposedly "shot up" prior to the murders, both recalled in vivid and horrible detail the events of the murders. See, e.g., statements of Appellant and Mahaffey, Respondents' Exhibits 1 and 3, respectively. Appellant could even recall during the post conviction hearing some of the fine details of the killings and events subsequent thereto. Appellant's and Mahaffey's ability to recall the events of the occurrences is clearly incompatible with the defense of insanity, be it premised on a drug-induced psychosis or anything else.

Trial counsel were aware of Appellant's drug use, although he only fully advised counsel the day before he pleaded guilty of the fact that he had shot up, and were convinced that his reactions were more like that of a person under the influence of an amphetamine. (T.R. 1111, l.7-1112, l.2). Additionally, the Appellant's own expert, Dr. Milne, testified that he did not consider Mahaffey's self-described "hallucinations" to be hallucinations under a scientifically accepted definition of hallucination. (T.R. 100, 11.6-21).

As to the Appellant's claim here that there may have been a defense of <u>involuntary</u> drug ingestion, it is completely ludicrous. There is nothing in the record to support such

a theory. And even if we assume, for the sake of argument, that the "Crystal T." was ingested by the Appellant, and even if we assume the "Crystal T." was PCP, and even if we assume that the "Crystal T." caused the Appellant hallucinations and black-outs, the drug ingestion was still voluntary. Again, Dr. Milne, the Appellant's expert, testified that the "street knowledge" about "Crystal T." is that it causes hallucinations. (T.R. 82, 11.4-16; T.R. 87, 11.22-25). It still should not be overlooked, however, that there is no evidence in the record to support a claim that the "drug" was PCP, and there is clearly nothing in the record to support a claim of hallucinations or black-out before, during or after the crimes.

As the lower court noted, it is the well-settled law of the State that voluntary drug ingestion is no defense to a crime. State v. Crocker, 272 S.C. 344, 251 S.E. 764 2d. (1979). There was, under the circumstances here, no need for trial counsel to have conducted further investigation into the effects of the drugs taken by the Appellant. Springer v. Collins, 586 F.2d. 329 (4th Cir. 1978). There existed then, and there exists now, no substantive defense based upon the Appellant's drug use. Respondents do not deem it entirely insignificant that W. Gaston Fairey, one of the Appellant's so-called "expert criminal defense lawyers," represented the codefendant Mahaffey who also claimed he

"shot up" and claimed that he had hallucinations. Nevertheless, Mr. Fairey chose not to pursue an insanity defense, probably because Mr. Fairey, not unlike Appellant's trial counsel, recognized that there was no insanity defense based upon the theory of voluntary or involuntary drug ingestion in this case.

In the final analysis, the lower court was absolutely correct: trial counsel conducted an exhaustive investigation into the facts of this case. Clearly, the factual investigation was consistent with the holdings of Cole v. Peyton, 389 F.2d. 224 (4th Cir.1968) and Marzullo v. Maryland, 561 F.2d. 540 (4th Cir.1977).

B.

Trial counsel conducted sufficient and adequate legal investigation.

The record discloses that Appellant's case was one of the first tried under South Carolina's Death Penalty Act of 1977. Section 16-3-20, et seq., South Carolina Code of Laws, 1976, as amended. The record further discloses that Appellant's case represented the first such case handled by trial counsel. Nevertheless, those two factors alone hardly demonstrate ineffective assistance of counsel. Nor do those factors require a shifting of the burden so as to require trial counsel to prove by a preponderance of the evidence that they were able and prepared to effectively represent the Appellant. As previously noted, trial counsel were all

experienced trial attorneys who had a substantial amount of criminal defense experience.

Additionally, the record shows that trial counsel obtained copies of the then new enactment. (T.R.1005, 1.16-1006, 1.41). The record further shows that trial counsel obtained copies and studied the latest pronouncements in the area of death penalty cases, including Gregg v. Georgia, 420 U.S. 153, 96 S.Ct. 2209 (1976), Gardner v. Florida, 430 U.S. 329, 97 S.Ct. 1197 (1977), and others. (T.R.1080, 1.17, T.R. 1081, 1.9, T.R. 1410, 1.3-10). Appellant's present counsel made a rather protracted, but wholly unpersuasive, attempt to demonstrate that trial counsel were somehow ineffective because they could not recall the names and specific holdings of cases which they had researched two and one-half years earlier. The lower court was rightly unimpressed with the contention. (Addendum, p.10).

The record additionally demonstrates that counsel filed, among other motions, a motion to change venue and a motion for continuance and a motion for severance. The motions were withdrawn prior to the pleas, but the record contains abundant evidence to support counsels' withdrawal of the motions.

In its order, the lower court specifically addressed each of the foregoing motions and the withdrawal of the motions. (Addendum, p.7). The lower court specifically

found that the withdrawal of the motions was the result of informed and deliberate judgments by counsel. (Addendum, p.7). The record fully supports the finding of the lower court.

Trial counsel testified at length as to why the motion to change venue was withdrawn. Essentially, the motion was withdrawn because of the cosmopolitan character of Richland County and its jury venire, and the fact that trial counsel were all extremely familiar with the jury venires of Richland County. (See, T.R. 999, l.11-1002, l.16; T.R. 1052, ll.1-25; T.R. 1312, ll.6-21). Present counsel cannot seriously contend that trial counsel should have argued a motion for a change of venue simply to protect the record for appeal purposes.[1]

The justification for the withdrawal of the other motions is also supported by the record. A motion to sever for guilt purposes was moot since Shaw pleaded guilty. (T.R. 1003, ll.18-23). As for severance at sentencing, trial counsel made the determination that it may have been to their advantage to have joint sentencing. (T.R. 1020, ll.4-14; T.R. 1021, ll.6-19). Those decisions were conscious and informed judgments made by trial counsel.

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[1]Under the venue statute, Section 17-21-80, South Carolina Code of Laws, 1976, the change of venue is first to an adjoining county in the circuit. Here, that would have been Kershaw County.

As to trial counsels' withdrawal of the motion to continue, it was done because counsel did not need additional time, and a trial during Christmastime appeared favorable because of potential sympathy. (T.R. 997, 1.21-998, 1.11; T.R. 1311, 1.22-1312, 1.5). Those considerations by trial counsel were clearly legitimate bases for withdrawal of the motion to continue.

As to the Appellant's claim that trial counsel were ineffective for not having raised exceptions to the constitutionality of the Death Penalty Act, supra., it of no help. This Court reviewed the Act in State v. Shaw, 273 S.C. 194, 255 S.E.2d. 799 (1979), cert. denied, 100 S.Ct. 690, reh. denied, 100 S.Ct. 694, and concluded that the Act is constitutional under the mandates of Gregg v. Georgia, supra., Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 261 (1978), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

C.

Trial counsel properly considered all viable defenses available to Appellant.

It is conceivable in this case, as in practically any other serious criminal case, that there exists a possibility of an insanity defense. That is not the issue here. The issue here is whether trial counsel properly considered and investigated the viability of an insanity under the facts of this case.

In view of the record, the answer is in the affirmative. Contrary to the ludicrous argument by Appellant that he met the test of insanity under M'Naughton (Appellant's Brief, pp. 47-48), there exists in this record no credible evidence that the Appellant could not distinguish right from wrong at the time of the crimes. The findings of the State Hospital, the findings of Dr. Lockhart, the conclusion of Dr. Harold Morgan all point inescapably to the fact that the Appellant was not psychotic at the times of the crimes.

As has been noted, supra., the Appellant himself recalled in detail the events of his murderous day, and there was no reason for trial counsel to have believed that the Appellant was psychotic or suffering from hallucinations or blackouts. The Appellant's own statements demonstrate that he was in complete touch with reality at all times. As was noted in Springer v. Collins, supra., there is no requirement that trial counsel do more than was done here when the facts disclose no support for an insanity defense. The efforts by trial counsel are in marked contrast to the singular efforts in Wood v. Zahradnick, 578 F.2d. 980 (4th Cir. 1978). Springer v. Collins, supra., controls here, especially in view of the fact that trial counsel here had the additional benefit of findings of competent psychiatrists that the Appellant was not insane.

As to the Appellant's claim that trial counsel overlooked and neglected a possible defense of involuntary intoxication, due to his suffering from Huntington's Chorea, it, too, is ludicrous. Such a defense depends upon a finding that the Appellant suffers from Huntington's Chorea plus a finding that Huntington's Chorea causes involuntary intoxication. The answer is simply that the Appellant is not presently suffering from Huntington's Chorea. Springer v. Collins, supra., is again dispositive on the allegation.

D.

Trial counsel gave Appellant competent advice.

The focus of Appellant's argument that trial counsel gave him grossly erroneous advice is premised upon two factors. One, the fact that the trial judge had voted for a death penalty act while he was in the Legislature, and, two, trial counsel did not select a jury to determine if any jurors could have been seated who were opposed to the death penalty.

As to the first allegation, the record shows that trial counsel advised the Appellant that Judge Harwell had voted for a death penalty statute while in the Legislature. All the Appellant's trial attorneys so testified. (T.R. 1020, 1.18-1021, 1.3; T.R. 1365, 11.7-15; T.R. 1418, 1.20-1419, 1.6).

As to the Appellant's complaint that a jury was not selected, the record again demonstrates the reasons. First, the picking of a jury could have lasted perhaps two weeks and there was legitimate concern that Appellant would have to face J. C. Shaw as a possible witness. (T.R. 1090, l.13-1091, l.3). Secondly, the Appellant and his parents wanted to go forward. (T.R. 1018, l.10-1019, l.5). Thirdly, even assuming that one or more jurors could have been selected who were opposed to the death penalty, that was clearly no guarantee whatsoever that the jury would have not imposed the death penalty. The statute requires that the juror, even though opposed to the death penalty, must take the customary oath to decide the issues of guilt and punishment according to the evidence. Section 16-3-20(E), South Carolina Code of Laws, 1976, as amended; State v. Tyner, 273 S.C. 646, 258 S.E.2d. 890 (1979). The testimony of Solicitor Anders is illustrative of the fallacious nature of Appellant's assumption that jurors who oppose the death penalty will not impose it under any circumstances. (T.R. 1278, l.12-1279, l.8).

The foregoing discussion of trial counsels' efforts are not intended to be exhaustive. But from those portions of the record cited, it is clear that the trial attorneys in this matter properly, adequately and effectively

represented the Appellant. Trial counsels' efforts were, indeed, well within the range of competence demanded of attorneys in criminal matters. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970); Marzullo v. Maryland, supra. The lower court so found and the record fully supports that finding.

The Appellant has argued that, inasmuch as his is a capital case, the standard of effective representation is greater than in any other case. Although there is no authority cited to support that specific proposition, Respondents do not disagree that death penalty cases require stricter scrutiny than other cases. In the present case, the lower court did just that by construing the evidence strictly against Respondents and for the Appellant. (Addendum, p.15).

Additionally, the record of the guilty plea itself cannot be overlooked. This Court has reviewed that record on the direct appeal in State v. Shaw, et al., and noted that the trial judge went the "second mile" in ensuring that the Appellant's pleas were voluntarily and intelligently entered. That record demonstrates that the Appellant had been properly counseled, understood each and every right available to him, and knowingly waived those rights.

Finally, the record here demonstrates the extent of the discussions between trial counsel and Appellant and his family. As is evident from the record, Appellant was advised thoroughly of each and every right available to him, and he understood exactly what his lawyers were telling him. See, Part III, infra.

The record contains an abundance of evidence supportive of the findings made by the lower court relative to the quality of representation afforded Appellant by his trial counsel. The holding of McCall, supra, requires that the findings be affirmed and the question dismissed.

II.

The lower court properly found that the Appellant was adequately represented at the sentencing stage of the proceedings. (Appellant's Question II)

The lower court found that trial counsel conducted themselves properly at all stages, including the sentencing phase of Appellant's convictions. (Addendum, p.11). The record fully supports that finding,and it must be sustained on this appeal. McCall v. State, supra.

There are two records which are of particular significance on this issue. The first is the record of the sentencing proceeding itself (T.R. Guilty Plea), and the findings by the trial court after mitigational evidence was presented. (See, State v. Shaw, et al., Appendix C, at p.237). The trial court's findings did not occur spontaneously; they were the result of trial counsels' having presented mitigational witnesses such as Dr. Edmond Camp, III, Mr. and Mrs. Roach and others. The testimony of Dr. Camp, though recklessly referred to by Appellant as perjurious, speaks for itself vis-a-vis the ultimate mitigational findings of the trial court. (See, T.R. Guilty Plea, 351, l.16-386, l.25). No, Dr. Camp did not testify that Appellant is insane. No, Dr. Camp did not testify that Appellant has Huntington's disease. No, Dr. Camp did not testify that

the Appellant had involuntarily ingested hallucinogenic drugs. But neither Dr. Camp nor trial counsel can be faulted because the Appellant is not insane, the Appellant does not presently have Huntington's disease, and the Appellant was not, voluntarily or otherwise, under the influence of hallucinogenic drugs at the time of the crimes. Nevertheless, the record of the sentencing proceeding demonstrates that Dr. Camp's testimony at sentencing was entirely consistent with the testimony presented by Appellant's "experts" at the post conviction hearing.

Two other final points must be made. One, the Appellant, chose, of his own volition not to make a closing statement. Trial counsel coached the Appellant to enable him to do so, and Mr. Brooks even wrote out a statement for him. (T.R. 1025, l.19-1026, l.7; 1353, l.14-1354, l.23; T.R. 1466, ll.6-17). The lower court, after having heard the testimony, properly concluded that the Appellant "made his own decision" not to take the stand. (Addendum, p.11).

The second point to be made is that trial counsel adequately prepared the mitigational witnesses to testify. As to family members and friends, there was very little preparation necessary. As to Dr. Camp, it is apparent that Mr. Brooks spent sufficient time with him because of the beneficial testimony which was introduced through Dr. Camp.

As to present counsels' obsession with Appellant's alleged fear of guns, two points can be made. First, the persons who had that information were James Broach and the Appellant. (See, testimony of James Broach). They should have volunteered the information, yet neither Broach nor Appellant bothered to tell counsel of such a fear. (T.R. 1153, l.18-1154, l.15). And, secondly, it understandably did not occur to trial counsel that Appellant had any fear of guns, especially in view of the fact that Appellant had admitted shooting Tommy Taylor and Carlotta Hartness with a .22 caliber rifle.

Again, Respondents submit that the record, considered in its entirety, contains an overwhelming amount of evidence to sustain the finding of the lower court that Appellant was adequately and effectively represented by trial counsel at the sentencing portion of his trial. That finding is, therefore, not subject to review by this Court. McCall v. State, supra.

III.

The lower court properly found the guilty pleas were freely and voluntarily entered in that the Appellant possessed sufficient capacity to enter his guilty plea and the record of the plea is constitutionally adequate. (Appellant's Question III)

A.

The lower court found that the Appellant "was able to understand the nature of the proceedings against him" and "capable of assisting in his defense." The Appellant presently relies on the testimony of Dr. Diane Follingstad, a clinical psychologist, who evaluated the Appellant prior to the post-conviction hearing. (T.R. 664-706). In her opinion, she did not believe the Appellant generally can "knowingly and voluntarily waive [a jury trial] on the fact that he does not understand the implications for them." (T.R. 684). Pursuant to the lower court's inquiry, Dr. Follingstad responded that she assumed a person with an I.Q. of 76 would cause her to seriously question whether or not that person could make reason decisions either for themselves or assisting a lawyer. (T.R. 705, lines 18-25). She had also previously testified that the Appellant does not have the capacity to understand abstract notions. (T.R. 1657). The lower court, however, rejected her analysis based on the testimony

of Dr. Harold Morgan and the Appellant himself. The lower court's finding of fact is wholly supported by overwhelming evidence in the record and the appeal on these issues must properly be dismissed. McCall v. State, 258 S.C. 463, 189 S.E.2d 6 (1972).

The test for competency to plead guilty to any crime in South Carolina is no more stringent than the test for competency to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). The South Carolina Supreme Court stated in Lambert:

> While low intelligence or limited education may cause an appellate court to review the defendant's plea carefully, it does not necessarily preclude a valid plea. Wood v. Cox, 316 F.Supp. 1336, 1337 (W.D.Va. 1970). State v. Lambert, 266 S.C. at 579.

The Appellant's contention that the Lambert analysis does not apply to death penalty cases is wholly unsupported in fact or law.

Clearly, the Appellant was capable of assisting in his defense and entering a plea of guilty. His own testimony at the post-conviction hearing related in detail his recollection of many events leading up to the criminal acts he was charged with including such incidental features as seeing a movie at codefendant Shaw's home and a conversation with victim Hartness prior to her murder. (T.R. 903-910, 949-950). More contemporaneous with the time of the guilty plea was the finding of the State Hospital that he was competent to

stand trial. Further testimony presented reflected that an examination by Dr. Wayne Lockart led to a cumulative finding that he was capable of standing trial at the time of his guilty plea. (T.R. 992-993, 1310).

The lower court was more impressed with the testimony of the Appellant than the testimony of Dr. Follingstad. The lower court found that the Appellant was able to understand many abstract questions put to him by his present counsel, which is clearly supported in the record. e.g. (T.R. 937, line 23-938, line 4). Therein, he was able to respond to many questions about legal concepts, such as trial by jury and unanimous verdict with apparent ease. Furthermore, the Appellant was capable of responding to questions on cross-examination which were also frequently abstract and dealt with various legal issues. (T.R. 954-963).

At the post-conviction hearing, the Appellant called Dr. Harold C. Morgan, a forensic psychiatrist, who examined the Appellant prior to the plea. He testified that the Appellant had the ability to understand abstract concepts put in his idiom. (T.R. 810). He further testified that he participated and concurred in finding the Appellant was competent to stand trial. (T.R. 814, lines 7-10). The witness further testified that the Appellant was capable of understanding things when they are explained at his level even when the concept may be greatly more complex than he is able to understand ordinarily. (T.R. 823, lines 16-22). He

further testified that the Appellant understood that it was wrong to kill, rape or rob. (T.R. 824). Certainly, this testimony itself rebutted much of the testimony of Dr. Follingstad and supports the findings of the lower court.

It is not insignificant that the Appellant's three trial counsels' testimony supports the lower court's finding. His lead counsel, Walter Brooks, testified that he met with the Appellant at least twelve times. (T.R. 993). In particular, counsel testified that he would break down the legal concepts to a basic language as possible to make him understand it such as a motion to continue (T.R. 998-999), change of venue (T.R. 1000), defenses (T.R. 1016), the burden of proof on the State to prove his guilt beyond a reasonable doubt (T.R. 1016), the requirement of a unanimous verdict (T.R. 1019), the punishment if he pled guilty of life or death by electrocution (T.R. 1019), that the decision would be up to a Judge if he pled guilty and a jury if he did not (T.R. 1019), his right to testify and make a closing statement (T.R. 1025-1026). Counsel further testified that he had no doubt that the Appellant understood what he was doing when he went before Judge Harwell and pled guilty. (T.R. 1017-1018, 1027).

The other trial counsel also testified about the Appellant's understanding of his rights surrounding his conviction. Counsel Barry B. George testified about the explanations of the various rights and legal concepts given

to the Appellant. (T.R. 1307-1308, 1317-1320). Of primary importance, he testified that in his opinion the Appellant "understood perfectly" what they were discussing with him about the plea (T.R. 1322), in particular about his ability to testify and the punishment he could receive. (T.R. 1323-1324). Co-counsel John Mason stated that in his judgment the Appellant understood what his rights were based on the discussions leading up to the plea. (T.R. 1416-1420). The ability of counsel to work with a defendant and their impressions of his understanding is certainly relevant evidence in support of the lower court's finding.

There is sufficient evidence to support the lower court's finding "that the alleged mental and emotional condition of the [Appellant] was not such as to prohibit him from understanding or appreciating his position" and "made informed, voluntary and knowing waivers of his constitutional rights." The Appellant failed in his burden of proof and his allegation to the contrary must be dismissed.

B.

The lower court properly found that Judge Harwell made no errors in his handling of the pleas and properly inquired into the understanding of the rights he was waiving and counsels' handling of the matter. The Appellant presently contends that the record of the plea itself is inadequate because it allegedly fails to demonstrate Appellant's understanding of the plea and its consequences, as well as the extent of trial counsels' factual and legal investigation. The record fully supports the lower court's finding to the contrary.

There is no duty upon the trial court to require a criminal defendant in a death penalty case or any other to recite into the record his understanding of each of the rights he was waiving during a guilty plea. In South Carolina, the trial judge is free to utilize any appropriate procedure for determining the accuracy of the guilty plea. State v. Armstrong, 263 S.C. 594, 211 S.E. 2d 889 (1975). The constitutional test established in Boykin v. Alabama, 395 U.S. 238 (1969), is whether the record establishes that a guilty plea was voluntarily and understandably made. If the record shows that the plea was so entered, then it is not silent as to the waiver of constitutional rights. Boykin does not, as the Appellant implicitly contends, require that every trial judge direct

the defendant's attention to each and every constitutional right, receive a narrative-like response of his understanding of that right, and then obtain a separate waiver of each. See; State v. Lambert, supra, at 578; Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972). Vickery v. State, 258 S.C. 33 (1972).

The record of the plea alone sufficiently reflects an understanding of the rights waived even though the responses were frequently one word responses. The Appellant maintained the Appellant could not understand the questions asked based on the testimony of Dr. Michael Rowls. Nevertheless, the record of the plea, when viewed in conjunction with the testimony of counsel at the plea and detailed at the lower court hearing abundantly supports the finding of fact by the lower court that undoubtedly the Appellant's guilty plea was voluntarily and intelligently entered. Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Such finding is binding on the Court. McCall v. State, supra.

The Appellant further complains that the plea record itself does not sufficiently show an inquiry of trial counsel about his investigation, research, motion decisions, and advice to the defendant. There is no duty upon a trial court to make this type of inquiry of counsel before it accepts a plea, especially in this case where tactical decisions weighed in the choice of who was desired for sentencing; a judge or a jury. Again, the court may, in its discretion, make

whatever inquiry it deems necessary in order to assist it in its determination of the voluntariness of the guilty plea. That inquiry does not necessarily include developing counsel's investigation and legal research and the Appellant's allegation to the contrary lacks merit.

The transcript of the guilty plea itself clearly reflects that the pleas to the various charges were entered in compliance with the mandates of Boykin v. Alabama, 395 U.S. 238 (1969). The plea transcript reflects a vigorous inquiry of trial counsel and the Appellant. Initially, the trial court inquired of lead counsel, Walter Brooks, concerning the plea of nolo contendere. (T.R. Guilty Plea 39). The trial court then asked trial counsel if he had explained each individual charge, the possible punishment, and the Appellant's desire to plead guilty or no contest on each individual charge. (T.R. Guilty Plea 40-50). Trial counsel advised the Court that he had discussed all the charges and potential punishment with the Appellant and his family. Trial counsel further advised the court that the decision was reached by the family after much consultation, and that the Appellant understood what he was doing. (T.R. Guilty Plea 49-50). Counsel further apprised the court that there were no plea negotiations, promises or threats that induced the Appellant's pleas of guilty. (T.R. Guilty Plea 50-51). Further, counsel affirmed that he was satisfied that his client was guilty of the charges, and that he had explained to the Appellant

his right to a jury trial with the opportunity to meet his accusers and cross-examine them, the presumption of innocence, the bifurcated trial aspect of the death penalty statute, the requirement of unanimous jury verdict, and the options available concerning having the jury or the judge decide the guilt or punishment. (T.R. Guilty Plea 52-53). The trial court further made inquiry of counsel concerning the jurors individually signing the indictment, life imprisonment as punishment if the jury could not reach a decision after a reasonable period of deliberation, and the Appellant's desire to waive a trial by jury. (T.R. Guilty Plea 53-54). Counsel apprised the court that he had discussed various defenses with the Appellant; specifically the defenses of insanity and intoxication. (T.R. Guilty Plea 55). Counsel further told the court that his client understood his right to remain silent. (T.R. Guilty Plea 55). Finally, the court inquired as to counsel's advice as to the possibility the jury could give life imprisonment or death by electrocution. (T.R. Guilty Plea 56).

The inquiry of counsel at the guilty plea sufficiently apprised the court of counsel's participation and responsibility in developing the intelligence and voluntariness of the guilty plea to meet the mandates of Boykin v. Alabama, supra, and State v. Armstrong, supra, and Wade v. Coiner, supra.

The Appellant's responses at the guilty plea reflect a complete understanding of the nature of the proceedings

in which he was participating. (T.R. Guilty Plea 39, 41-43, 49-51, 54, 56-62, 64-65). The record reflects that the Appellant affirmed that he fully agreed with everything his lawyer had stated and with his answers. (T.R. Guilty Plea 56). Further, he stated that his parents were in accord with the decision to plead guilty. Most importantly, he affirmed that he had not been promised anything or threatened in any way to induce his pleas. He then affirmed that he understood his rights to a jury trial, the requirement of a unanimous verdict, and that by waiving his jury trial he was asking the court to determine whether he received life imprisonment. (T.R. Guilty Plea 59). He further stated that he was satisfied with the way his attorneys had advised and represented him. He also related to the trial court that all the decisions had been fully discussed with his family and his attorneys. Finally, he stated it was his desire to enter pleas of guilty. The Appellant's responses carry with them a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, at 74 (1977). The Appellant testified at the hearing that he was telling the truth when the trial court asked him questions. (T.R. 963).

The Appellant wholly failed to satisfy the lower court by a preponderance of the evidence and demonstrate a reason why his responses at the guilty plea hearing should not be taken at face value. The guilty plea inquiry by the trial court sufficiently supported his finding of the voluntariness

of the plea within the mandates of Boykin v. Alabama, supra. Furthermore, when this Court essentially addressed this same issue on direct appeal it stated:

> No issue is raised on appeal regarding the validity of appellant's guilty pleas. We have reviewed the record, however, and are satisfied the guilty pleas were properly taken. The able trial judge went the second mile to insure that the guilty pleas were given knowingly and voluntarily. State v. Shaw and Roach, 273 S.C. 194, 255 S.E.2d 799, at 801 (1979).

When the record of the guilty plea is read in conjunction with the testimony presented here, the conclusion is inescapable: the Appellant pleaded guilty freely, voluntarily and intelligently with a full understanding of the consequences. Vickery v. State, supra. Appellant's bare contentions to the contrary are without merit and the lower court's decision must be affirmed.

IV.

James Terry Roach, having knowingly and intelligently waived his rights to a jury trial, can be constitutionally sentenced to death without a jury determination of his sentence. (Appellant's Questions IV and V)

The Appellant contends that the provision of the South Carolina Death Penalty Act is unconstitutional because it does not provide for a jury determination of sentencing following a guilty plea. Respondent submits that this issue was waived for review in this case at the original plea and sentencing.

The Appellant entered his guilty plea after being fully advised by the Court of his right to have a jury determination of guilt and sentencing. (T.R. Guilty Plea, 56). After being instructed on these rights, the Appellant apprised the Court that he desired to waive his rights to a jury trial. (T.R.Guilty Plea, 56). Prior to the Appellant's waiver, the Court inquired of counsel Brooks as to whether he advised his client of his rights to a jury trial; in particular as to whether he advised him of his right to require that a jury determine the appropriate sentence. (T.R. Guilty Plea, 53-54).

The Appellant did not object to having been sentenced by the judge rather than the jury. The record of the plea in fact shows that the Appellant, through his counsel, concurred that the judge alone would determine the sentencing.

(T.R. Guilty Plea, 44-45). This concurrence to judicial sentencing precludes the Appellant from raising any alleged constitutional defect at this stage. The Appellant never requested that the court have the jury impose the punishment rather than the trial judge. In fact, once the decision to plead guilty was made, the Appellant's counsel wanted a judge. (T.R., 1098, 1.4). Absent such a request or denial by the Court at the guilty plea, the Appellant is presently barred from asserting the issue concerning the statute at this stage in Post Conviction Relief. Ashley v. State, 260 S.C. 436, 196 S.E.2d. 501 (1973). Any objection that the Appellant might have had was thereby waived, and having been waived affords no ground for Post Conviction Relief. McCreight v. MacDougall, 298 S.C. 222, 149 S.E.2d. 621, 622 (1966); Cummings v. State, 260 S.E.2d. 187 (1979); Miller v. State, 269 S.C. 113, 236 S.E.2d. 422 (1977).

The record amply reflects that the Appellant's waiver was an intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). As stated previously, the Appellant was fully advised of his right to have a jury determine punishment. Of primary significance, the record of the Post Conviction hearing contains a plethora of testimony by his trial counsel of the reasons surrounding the tactical decision to avoid a jury and have Judge (now Justice) Harwell assess the punishment. (T.R., 1019-1020, 1086, 1088, 1098, 1364-1368).

Nevertheless, there is no constitutional right to require that only a jury can determine whether capital punishment is appropriate. And if, indeed, that constitutional right does exist, it is no so fundamental that it cannot be knowingly and intelligently waived as was done here.

The right to a trial by jury in criminal cases is fundamental to the American system of justice. Article III of the United States Constitution provides that the trial of all crimes, except of cases of impeachment, shall be by jury. The Sixth Amendment to the Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. The South Carolina Constitution provides similar protection in Article I, Section 14, where it states:

> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury...

This right has evolved from English common law which first guaranteed the right in the Magna Carta. It was introduced in this country by the colonists who considered it a right under the English law and incorporated it as a basic right through our constitutional system of federal and state jurisprudence. The right of a trial by jury is protected in the South Carolina Death Penalty Act by

the state and federal constitutions.

The constitutional right to a trial by jury does not, however, emcompass the right to have the jury assess the punishment. The jury trial right generally is limited to the question of guilt or innocence and does not extend to the determination of the term of punishment or imprisonment. The alleged right to have a jury assess punishment was not a part of the right to trial by jury at common law. State v. Morton, 338 S.W.2d. 858 (Mo.1960); Payne v. Nash, 327 F.2d. 197 at 200 (8th Cir.1964). Appellant's right to a jury trial is the same that existed at common law. There is no federal constitutional right to have the jury set punishment generally, James v. Twomey, 466 F.2d. 718 (7th Cir.1972), or on a guilty plea. Parrish v. Beto, 414 F.2d. 770 (5th Cir.1969), cert. den. 396 U.S. 1026 (1969); Hallinger v. Davis, 146 U.S. 314 (1892).

Under federal law, the court, and not the jury, fixes punishment, and that does not offend due process. Williams v. People of the State of New York, 337 U.S. 241 (1969); see also, Fed.R.Crim.Proc. Rule 32, 18 U.S.C. 4506. Though the South Carolina death penalty statute makes it permissible for the jury to assess punishment, it is only a conditional privilege based upon the statute itself. If the defendant pleads guilty, the statute provides for the judge to determine the issue of punishment and not a jury. Compare: Fogg v. Commonwealth, 215 Va. 164, 207 S.E.2d. 847 (1974);

Burden v. State, 54 Ala. App. 545, 310 So.2d. 264 (Criminal Appeals 1975). Thus, there is nothing in the Due Process Clause of the Fourteenth Amendment of the United States Constitution, nor in the Constitution and laws of the State of South Carolina which can give the Appellant the absolute right to have his punishment assessed by a jury when he enters a voluntary, knowing, and intelligent plea of guilty. Furthermore, the guilty plea acts as a waiver of his right to a trial by jury and all incidents thereof. It is clear, therefore, that the Appellant was not denied any constitutional or statutory rights when the statute provides for punishment to be assessed by the judge following a guilty plea, and pursuant to such statutory authority, the judge assessed the punishment of death by electrocution.

The United States Supreme Court has not directly addressed this issue in its post-Furman decision. The Supreme Court stated in Proffit v. Florida, supra. 428 U.S. at 252, discussed the issue of jury versus judge sentencing:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition, at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

See also, Lockett v. Ohio, 438 U.S. 586, at 630, (concurring and dissenting opinion by Justice Rehnquist.

The Appellant's argument does not fit the factual circumstances surrounding the sentence in the Appellant's case. The issue of judicial sentencing was not constitutionally defective, and the Appellant's contention must be denied. In summary, there is no constitutional requirement that only a jury can sentence a capital defendant to death, especially when the defendant desires the punishment to be meted out by the judge rather than a jury.

V.

The lower court was absolutely correct in holding that Appellant had utterly failed to demonstrate that the South Carolina Death Penalty Statute has been disproportionately requested and imposed against individuals who are accused and convicted of taking the lives of white victims. (Appellant's Question VI)

Appellant apparently concedes the utter incredibility of testimony offered on this point, contending that this Court should take upon face value the testimony of an alleged expert to the effect that the South Carolina Death Penalty Statute had been applied disproportionately to those individuals who have murdered white victims as opposed to black victims, and "stay all executions under the new South Carolina Death Penalty Statute until an up to date study could be conducted to determine whether said statute has continued to be applied in a racially discriminatory way. If this study corroborates the original results of Dr. Jacoby, said statute should be declared unconstitutional as applied and Appellant's sentence vacated." (Appellant's Brief, p. 107). As to this testimony, which presents a theory being used to attack death penalty statutes across the nation, the trial court observed:

> I completely reject the position of Applicant regarding the statistical proof that the death penalty has been

> . disproportionately applied upon individuals who commit aggrevated murder on white victims under our Act. The testimony offered was not credible. The witnesses did not consider all the available parameters. The writer of this opinion has probably tried more capital cases under the Act than any other judge in our state. My personal experience refutes the offer of proof. I have tried two blacks for murder of whites and a white for murder of a white who were given life sentences. On the other hand, I have tried two whites for murder of a black and a white for murder of a white who were given death sentences. These jury verdicts were, each, in my opinion appropriate under the facts of the cases presented. (Addendum, p. 14-15).

Respondent respectfully submits that a review of the transcript of offered testimony on this issue completely demonstrates that it was admittedly as well as demonstrably incomplete and inaccurate and that it was, hence, patently useless and probative of nothing. The record reflects many glaring errors in the statistical study, such as the complete omission of one of the condemned white individuals tried and sentenced to death in this State for kidnapping and murdering a black woman. More importantly, the Appellant's witness specifically stated that he could not prove discrimination in this particular case. In fact, not only could the Applicant's own expert witness not even demonstrate that South Carolina's Death Penalty Statute is being applied in a discriminatory manner, he freely admitted under cross-examination by the State that many lawful explanations totally unrelated to

race could cause an appearance of racially disproportionate impact of a statute.

In this latter regard, the Fifth Circuit Court of Appeals has extensively reviewed the theory proposed by Appellant in the instant case on a record where the Applicant had at least made a significant and noteworthy attempt to prove its credibility. In that case, wherein finality of judgment and execution of the death sentence has since been imposed after summary review by the United States Supreme Court, said theory was rejected as baseless and incredible. Spinkellink v. Wainwright, 578 F.2d 582, 612-616 (5th Cir. 1978). Respondents respectfully submit that the precise conclusion should prevail in the instant case, and that Appellant's exception should be dismissed.

VI.

The lower court correctly determined that Appellant is presently sane. (Appellant's Question VII)

Appellant contends on this appeal that he is presently insane and should therefore not be executed. Respondents respectfully submit that, while the evidence and factual determinations necessary to determine this issue are contained in the record, Appellant presents a completely new argument on this appeal which was simply not presented to the lower court. In essence, the question of Appellant's sanity at his post-conviction hearing revolved around whether or not trial counsel had sufficiently investigated his capacity to commit the crimes for which he stood charged before pleading him guilty. As to this issue, the lower court finally concluded:

> In favor of life, and to be sure that every right of Applicant was protected, I appointed as the Court's witness and ordered Dr. Charles M. Still, who present counsel for Applicant introduced as the leading authority on Huntington's Chorea, to examine Applicant and his mother.
>
> I was greatly impressed with the testimony of Dr. Still and with his desire to be helpful to Applicant and to the Court. Dr. Still's testimony is that the mother is suffering from Huntington's Chorea and that it may be transmitted from her to Applicant genetically. He found no evidence that Applicant has Huntington's Chorea and he was unable to advance an opinion that it would most probably develop. It is Dr. Still's testimony that Applicant has always had and will always have a fifty per cent chance of having Huntington's Chorea. It therefore follows that from

> a medical diagnostic standpoint the testimony of Dr. Still and Dr. Camp are not materially different. (Addendum, pp. 8-9).

On this appeal, Appellant attempts to take the finding of Dr. Still that he has a fifty per cent chance of having Huntington's Chorea and turn it into an argumentative conclusion that he is presently insane. Respondents respectfully submit that the record of Dr. Still's testimony demonstrates that the precise opposite is true.

Therefore, Respondents deem it unnecessary to address Appellant's researched arguments concerning execution of the insane when, in fact, he has utterly failed to demonstrate that he was insane at the time the crimes were committed or that he is presently insane. Appellant's contentions alleging otherwise are patently frivolous.

VII.

The lower court did not err in failing to hold that the admission of the testimony of Dr. Edmund W. Camp, III, denied the Appellant a fair trial. (Appellant's Question VIII)

The burden of proof in a post-conviction hearing in South Carolina is for the Appellant to show by a preponderance of the evidence that he is entitled to the relief requested. Respondents submit that the Appellant failed in his burden of showing that the court relied on materially false information. Townsend v. Burke, 334 U.S. 736 (1948). The Appellant contends that the testimony of Dr. Camp at the sentencing hearing contained inaccuracies that denied him a fair trial. (T.R. Guilty Plea 351-380). The lower court properly held that there was no error in presenting Dr. Camp as a witness and implicitly that there was no materially false information presented to the trial court. The lower court's findings are supported by the evidence and his contention to the contrary must be dismissed.

In particular, the lower court found that from a medical diagnostic standpoint the testimony of Dr. Charles M. Still, an expert on Huntington's Chorea, and Dr. Camp were not materially different with respect to the Appellant. Dr. Camp testified that Huntington's Chorea was present in the Appellant's family and that it is an inherited brain deteriorating disease. (T.R. Guilty Plea 363, 369-361).

In particular, he testified that they could not tell at the present time whether or not the Appellant had Huntington's disease. (T.R. Guilty Plea 371, lines 10-24). Dr. Still testified at the hearing as an expert on Huntington's Disease that the Appellant "presently does not meet the generally accepted criteria to justify a diagnosis of Huntington's Disease." (T.R. 1210, lines 16-19). He also testified that there is no guarantee that the Appellant will not develop manifestations of the disease in the future. (T.R. 1214, 1251). However, he was clear to point out that his risk is no more and no less than fifty per cent based on the mother's finding. (T.R. 1214, 1252). Furthermore, Dr. Still testified that the symptons of the disease comes on later in men than in women and the mean age is around thirty-five years of age in both sexes. (T.R. 1270). This complements the testimony of Dr. Camp who testified that diagnosis of the disease would occur from thirty-five to fifty years of age. (T.R. Guilty Plea 370).

It is clear that Dr. Still's testimony paralleled the testimony of Dr. Camp. The findings were equivalent. Dr. Still testified in more detail and the diagnosis that the Appellant's mother suffers from the disease immediately prior to his testimony enabled him to make a more certain prediction of the probabilities of the Appellant's risk, which was not available when Dr. Camp had testified. Nevertheless, the evidence presented supports the findings of the lower court.

Appellant also contends it was error to allow the testimony of Dr. Camp concerning the drug "crystal tea" at the guilty plea. Dr. Camp testified that the Appellant had injected crystal tea or diamond crystal THC in his vein prior to the incident. (T.R. Guilty Plea 373, 357). Dr. Camp referred to "THC" as an hallucinogenic drug. (T.R. Guilty Plea 357, line 15). The Appellant presented the testimony of Dr. Larry Milne, a pharmacologist, to challenge this testimony. Dr. Milne testified the THC technically is not a hallucinogenic drug. (T.R. 67), though some physicians may disagree with him (T.R. 79). He further testified that the street drug referred to as diamond crystal THC was probably phencyclidine referred to as PCP or angel dust, which is an hallucinogenic drug, or LSD or nothing such as talcum powder or corn starch. (T.R. 46, line 5-9). The testimony of Dr. Camp was based on the information related to him by the Appellant and his street references (T.R. Guilty Plea 373). The testimony of Dr. Milne was based on his general experience in drug abuse in South Carolina at that period of time. Unfortunately, neither had access to whatever material was allegedly taken by the Appellant so that tests could be run to remove Dr. Milne's speculative analysis. Nevertheless, it is clear that the Appellant was not prejudiced by the testimony surrounding the drug injections because the trial judge found as a mitigating factor that the Appellant was under the influence of dangerous drugs. State v. Shaw, et al., supra, Appendix C.

Also, Dr. Camp's testimony that the Appellant was a borderline mental retardate (T.R. Guilty Plea 356, 362) with a low fund of knowledge (T.R. Guilty Plea 358) concurred with the testimony generally presented by Dr. Morgan and Dr. Follingstad. It is not insignificant that Dr. Morgan participated in the evaluation of the Appellant prior to his guilty plea and concurred in the staff findings relayed to the trial court. The Appellant's implicit contentions to the contrary are not supported by a thorough review of the evidence presented.

Therefore, the record fully supports the findings of the lower court that the testimony of Dr. Camp was not materially false nor did it deny the Appellant in anyway a fair trial.

VIII.

Appellant's sentence of death received meaningful proportionality review by this Court. (Appellant's Question IX)

Appellant commits a most direct frontal assault upon an action taken by this Court by alleging that it has, by its own actions of refusing to open its files, denied him due process. He claims that this Court, by affirming the imposition of the death penalty upon him while admitting its inability to compare the proportionality of the sentence imposed upon Appellant against similar cases, violated his rights to due process and equal protection and undermined the procedural regularity required to determine that death is an appropriate punishment mandated by the Eighth Amendment to the United States Constitution and Article I, Section XV of the South Carolina Constitution.

As its opinion clearly establishes, this Court conducted a complete review of the imposition of the sentence of death upon Appellant. It specifically found that the sentence was not influenced by passion, prejudice or any other arbitrary factor, but was the product of sound and careful deliberation based upon the evidence and that the evidence supported the findings of statutory aggravating circumstances beyond a reasonable doubt. Shaw, supra. Appellant asks this Court to review its prior decision and either reverse itself, or make its record available to allow him to challenge its

proportionality review at some unforeseen point in the future. That point could not be, nor could it have been, in the lower court since such a matter of reviewing the the decision of this Court would not properly be one for determination by the lower court. Simmons v. State, supra. The inherent paradox in this exception is obvious.

At any rate, Appellant blatantly challenges the opinion of this Court in Shaw that his sentence of death is proportionate to the magnitude of the crimes for which he stands convicted. Respondents not only necessarily contend the correctness of this Court's proportionality review in the instant case, but points out the significance of the fact that this question was presented to the United States Supreme Court by way of a Petition for Writ of Certiorari, which was denied. Respondents respectfully submit that this exception is without merit.

IX.

The lower court properly refused to disturb or set aside the death penalty affirmed by the decision of this Court in State v. Shaw, et al. (Appellant's Question X).

The agrument here by Appellant is that the lower court, sitting in post conviction relief, committed error in not overruling this Court's affirmance in State v. Shaw, et al., of the death penalty upon Appellant. The Appellant also claims that this Court should now review its own decision and hold that the Appellant's constitutional rights were violated because of the fact that the trial court failed to find that the Appellant intended to take or personally took human life. The argument deserves little, if any, discussion. Respondents simply refer this Court to its own opinion in Shaw, supra., where this Court noted that there was testimony in the record which demonstrated "that both Shaw and Roach were triggerman." Shaw, supra., at p. 204. There exists no justification whatsoever for this Court to modify its opinion in that regard, except, perhaps that the opinion that Appellant was a triggerman has now been demonstrated beyond doubt by way of the testimony of Mr. Brooks, Mr. Mason and Mr. George all of whom testified that Appellant had confirmed Ronnie MaHaffey's version that Appellant shot young Taylor and Miss Hartness. (See, Part I, supra.)

X.

The lower court properly refused to hold that the imposition of the death penalty upon the Appellant is disproportionate. (Appellant's Question XI)

This Court has, as observed by the lower court, already passed upon the issue of whether the death penalty as applied to the Appellant, was a proportionate punishment. (Addendum, p. 13). This Court has thoroughly addressed that issue based upon the record before it and has determined that the death setnece imposed upon the Appellant was not arbitrary or capricious, but was the products of sound and careful deliberation based upon the evidence. State v. Shaw, et al., at p. 210. The lower court, after having noted that the issue was not properly before it, did conclude that if the issue was properly before it, it would conclude that Appellant's death sentence was not disproportionate. (Addendum, p. 14).

Notwithstanding the fact that the question has been addressed once by way of direct appeal and, therefore, is not properly before this Court Simmons v. State, 264 S.C. 121 (1975), the record demonstrates beyond question that the imposition of the death penalty upon Appellant was not disproportionate for the offenses committed. The record of the guilty plea proceeding itself contains, as this Court

has already noted, evidence that the Appellant was a triggerman. (See, T.R. Guilty Plea, 165, line 12-166, line 4; 228, line 14-236, line 4). As a result of the testimony presented at the post-conviction hearing by all three of Appellant's trial counsel, Argument I, supra., it is clear beyond any doubt that the Appellant was a triggerman as to both victims and participated in the actual murder of two persons.[2]

The Appellant's reliance upon Lockett v. Ohio, supra., and Croker v. Georgia, 433 U.S. 504, 97 S.Ct. 2861 (1977), though obviously not intended to do so, mark the sharp, well-focused contrasts between himself and those spared the death penalty by recent holdings of the High Court. Appellant is no Sandra Lockett, a person sitting in a get-away car while a store clerk was gunned down inside his place of business;[3] Appellant is no Anthony Coker whose crime was that of rape on adult woman who was subsequently released unharmed. Appellant is James Terry Roach, one who has committed two brutal and premeditated murders.

As to the Appellant's claim that the death sentence is disproportionate in his case because he suffers from

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[2]Respondents, nevertheless, note that the United States Supreme Court has never held that one must actually pull a trigger in order to be punished by death. In fact, in Lockett v. Ohio, supra., the Court noted as follows:

> [T]hat States have authority to make aiders and abbettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge. 438 U.S. at 602.

[3]Lockett was not necessarily spared because she was not in the store. She was spared because Ohio's statute precluded certain mitigational testimony.

Huntington's Chorea and therefore was involuntarily under the "influence of dangerous hallucinogenic drugs," it is absurd. There is no evidence to support the Appellant's claim that he suffers from Huntington's Chorea. Argument I, supra. There is no credible evidence which supports Appellant's claim that the "drugs" he ingested were a dangerous hallucinogenic drug (PCP). Arguments I and II, supra. And there is no evidence in the record which demonstrates that the Appellant involuntarily ingested the drugs. Arguments I and II, supra.

The Appellant argues here that there must be proof beyond a reasonable doubt that he committed an intentional killing. Respondents note that the Appellant pleaded guilty to two counts of murder. For Appellant's benefit, a conviction for murder depends, as a matter of law, upon an intentional killing of another human being. As a matter of fact, the record of the trial and sentencing proceeding and the record of the post-conviction hearing contain proof beyond any doubt that Appellant intentionally killed two persons.

To the extent that the death penalty is a constitutional form of punishment, as the United States Supreme Court has held in Gregg, supra., and its progeny, the imposition of the death penalty upon the Appellant was appropriate. That sentence must remain undisturbed by this Court.

XI.

The imposition of the death penalty upon Appellant has already been found by this Court to be constitutionally proportionate. (Appellant's Question XII)

Appellant continuously fails to recognize that collateral attack upon a conviction does not permit an attack on the ground that the evidence was insufficient to support a conviction. Section 17-27-20(6), Code of Laws of South Carolina (1976). Appellant also fails to recognize the general principle that a plea of guilty constitutes an admission of guilt and relieves the State of its burden to prove guilt beyond a reasonable doubt. Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975). Furthermore, the only reason that Appellant was permitted to present evidence of diminished capacity at all was based upon his contention trial counsel were ineffective in failing to present it. His theory of attack, of course, was that defense counsel failed to discover these allegedly undiscovered and material facts, and to present them to the court, and was therefore incompetent. However the trial court, and this Court on appeal, has substantial testimony from the penalty phase of Appellant's trial that he, in fact, knew right from wrong and was not suffering from diminished capacity to the point of legal insanity. Furthermore, Appellant's continuous references to drug and alcohol abuse as a cause

of his diminished capacity are simply irrelevant to the question of guilt or innocence since voluntary intoxication does not constitute a valid defense to crime. State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).

In essence, even if this Court were to consider all facts presented by Appellant and cited in his Brief at pages 144-154, Respondents respectfully submit that Appellant has in no way demonstrated anything which would materially affect the determination of his guilt or innocence. Furthermore, Appellant also fails to cite the fact that the trial court, after hearing all testimony during the penalty phase, found as mitigating circumstances that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, that the defendant acted under duress or the domination of another person, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and that the defendant was below the age of eighteen (18) at the time of the crimes. Furthermore, there was significant psychiatric testimony regarding these facts and, in particular, that Appellant is a mental retardate with an antisocial personality disorder. Respondents contend that Appellant simply demonstrated nothing in his post-conviction relief hearing, even if such a consideration would have been proper by the lower court, which was in anyway convincing of his present argument

that some stone was left unturned which would somehow have affected the determination of his guilt or sentence. In fact, the testimony of Appellant's own psychiatric witness on this point, Dr. Harold Morgan, was to the effect that Appellant indeed possessed the ability to differentiate right from wrong and to appreciate the criminality of his acts.

This Court unequivocally found on Appellant's direct appeal that this sentence of death was fully supported by the record, which demonstrated it to be the result of sound and careful deliberation based upon the evidence. The lower court in the instant case also found as a matter of fact that Appellant had the benefit of an objective, fair and impartial sentencing authority whose decision as to Appellant's sentence was fully supported by the record and justified under the facts. This includes the finding of the trial court, based upon sufficient evidence, that Appellant was in fact a trigger man. This fact, of course, was found to be supported by the record by this Court.

Not only is the fact that Appellant was a trigger man a matter which is fully supported by the record, but it is a matter, along with Appellant's mental capacity, which was relevant only to Appellant's guilt or innocence of the crime and therefore not a proper subject for consideration at Appellant's post-conviction hearing or on this appeal. Simmons v. State, supra. Appellant's contention alleging otherwise is patently without merit.

XII.

The lower court properly held that the Appellant had not met his burden of showing by a preponderance of the evidence that there are any meritorious grounds for relief. (Appellant's Question XIII)

The Appellant contends that based on an alleged showing that a totality of the circumstances requires that he is entitled to relief. In particular, he makes the bare contention that it was fundamentally unfair to prepare a death penalty case within thirty-nine (39) days, that pre-trial publicity was extensive, unusual and prejudicial, and the sentencing judge was neither fair, impartial, nor free from prejudgment. Respondents submit that there is sufficient evidence in the record to support the lower court's finding to the contrary.

The lower court found that the media coverage was extensive, but not inflammatory. Furthermore, it found that the Appellant did not meet the Sheppard v. Maxwell, 384 U.S. 333 (1966) test in showing the publicity was such as to have been inherently prejudicial and would have precluded him from receiving a fair trial. The findings are supported by the evidence in the record and the Appellant has failed to present a cogent reason to contest the findings. (Petitioner's exhibits 2-5). The contention must be denied.

The contention that the time for trial preparation was inherently unfair was rejected by the lower court when it found the failure to pursue a continuance motion was not improper. The preparation of counsel for the trial is well documented in the record and the argument in this brief concerning Questions I and II, which are incorporated herein by reference. The allegation to the contrary is without merit and must be dismissed.

The Appellant's final contention concerns the alleged "uncontradicted" impartiality of the Honorable David Harwell. In the Appellant's brief, he makes the following statement:

> In the course of the hearing before this Court Appellant presented uncontradicted evidence showing that the trial judge in his case, the Honorable David Harwell, was neither fair, impartial, nor free from any prejudgment of Appellant's case. Among other things, Appellant showed that Judge Harwell was an advocate of the death penalty, that he, with the assistance of the circuit solicitor, manipulated case assignments to assure that he would be trying Appellant's case, and that he was subjected to pressure from another circuit judge and a justice of the South Carolina Supreme Court to impose a death sentence against Appellant. Taken together, this evidence that Judge Harwell was neither fair, impartial, nor free from any prejudgment of Appellant's case. (Appellant's Brief, p. 157).

The Respondents and the entire judicial system must be greatly disturbed by the statement and the taint that it puts on the justice system in South Carolina. What is more disturbing, however, is that the above statement is made by the Appellant without any evidentiary support

in the record before this Court. In particular, there is no evidence of any improper manipulation of case assignments to insure that Judge Harwell would hear the case. Cf. (T.R. 829-833). Furthermore, Solicitor James Anders' testimony specifically denied having improper contact with Judge Harwell (T.R. 1279-1281). In point of fact, the Appellant fails to understand that in the South Carolina criminal justice system the Solicitor generally calls the particular cases to be heard.

The Appellant further contends that Judge Harwell "was subjected to pressure from another circuit judge and a justice of the South Carolina Supreme Court to impose a death sentence against the Appellant." Again, a review of the entire record in this matter fails to reveal one scintilla of probative evidentiary support for these libelous statements. The record reveals that Danny Beck, an Assistant Public Defender for Lexington County, presented testimony concerning a conversation he alleged he had with Judge Rodney A. Peeples. (T.R. 706-710).

Mr. Beck's testimony was properly objected to as being hearsay by the Respondents. (T.R. 707, lines 10, 12). The Appellant then sought to introduce the material not for the truth of the matters asserted, but as an offer of proof to allow for a subpoena of Judge Peeples. (T.R. 708, lines 1-3). In the limited context within its presentation,

Mr. Beck testified as follows:

> ... Judge Peeples the best I can remember made a statement to the effect that he and someone else, another judge, had spoken to Judge Harwell that if he didn't know what to do in that case he would be holding court in some remote corner of South Carolina for the rest of his life. (T.R. 708, lines 13-18).

Furthermore, there is no reference to "any pressure" "to impose the death penalty," nor is there any reference to any member of this Honorable Court. It is particularly interesting to note that the Appellant did not call Judge Peeples after his "offer of proof."

The lower court properly found that Judge Harwell made no reversible errors in his handling of the taking of the pleas, the sentencing hearings nor the imposition of the sentence. This is clearly supported by a review of the entire record. The totality of circumstances reveals impartiality and a quest for the truth and justice on the part of Judge Harwell and the courts of South Carolina. The bare contentions of the Appellant are without evidentiary support. The allegations must be denied and dismissed. McCall v. State, supra. State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974).

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Court affirm the Order of the lower court and dismiss the appeal.

Respectfully submitted,

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Columbia, South Carolina.